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Report on

Spousal Agreements

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

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LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON SPOUSAL AGREEMENTS

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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TO THE HONOURABLE BRIAN R.D. SMITH , Q.C.
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON SPOUSAL AGREEMENTS

It is the policy of the *Family Relations Act*, R.S.B.C. 1979, c. 121, to encourage spouses to enter into agreements concerning their property and support obligations. The provisions of an agreement on property, however, may be varied if a judge thinks they are unfair and an agreement on support obligations does not restrict the courts' jurisdiction to order maintenance. The result is that spouses may not rely upon their agreements with confidence. Moreover, many matters which could have been satisfactorily resolved by agreement, end up being disputed in court.

In this Report the Commission makes recommendations to enhance the ability of spouses to regulate their rights and obligations by agreement.

CHAPTER I INTRODUCTION

A. The Need for Agreements

Whenever people become involved in a financial enterprise, they are well advised to enter into an agreement stipulating their respective rights and interests during the life of the enterprise and on its conclusion. This is no less true where the financial enterprise is marriage rather than a commercial venture. Unfortunately, people who marry usually do not turn their minds to these questions until the possibility of marriage breakdown arises.

Under the law in force until 1972[1] there was little legal intervention with the explicit or tacit arrangements of financial interests made by spouses. Unfairness was a consequence for several reasons. Title to property was often placed as a matter of course in the name of the spouse who was the income earner, undervaluing or ignoring the contributions of the spouse who was homemaker. During the course of the marriage it did not usually matter who owned property. On marriage breakdown it was usually too late to correct matters.

The enactment of the current *Family Relations Act*[2] provided a dramatic solution to this problem. Under that Act, spouses are entitled to their separate property during the currency of their marriage. On marriage breakdown the nature of property changes. It may be classified as either "family assets" or "business assets."[3] Regardless of who originally "owned" the property, each spouse becomes entitled to a one-half interest in family assets. A spouse may also be entitled to an interest in business assets owned by the other spouse, if he or she contributed, directly or indirectly, to their acquisition.[4]

In many cases, equal entitlement to family property might be perceived as unfair. Consequently, courts were given the discretion to vary the statutory entitlement[5] and it was also open to spouses to agree on what their rights and interests should be.[6] Under the *Family Relations Act*, however, the courts have jurisdiction to vary an agreement made by spouses if it is unfair.[7]

B. The Potential for Litigation

The introduction of the current *Family Relations Act* coincided with a dramatic increase in family litigation. New legislation often invites litigation, particularly if it incorporates a judicial discretion. Other factors have undoubtedly contributed to the number of cases which proceed to trial. Increasing property values in 1979 and 1980 provided spouses with the subject matter of, and the means of financing, a dispute. Economic recession over the past several years has placed additional strain on relationships. The incidence of divorce or separation is high. These are all factors which promote litigation.

Over the past several years, lawyers and members of the public have expressed concern over the operation of the property provisions of the *Family Relations Act*.

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[1] In 1972, the *Family Relations Act*, S.B.C. 1972, c. 20, was enacted. Sections 8 and 9 of that Act gave the courts jurisdiction to vary property rights. Most of the litigation under that Act concerned entitlement to the matrimonial home: *see further* K.B. Farquhar, "Section 8 Of The Family Relations Act — An Experiment In The Exercise Of Judicial Discretion and The Distribution Of Matrimonial Property," (1979) 13 U.B.C. L. Rev. 169. That Act was replaced by the *Family Relations Act*, R.S.B.C. 1979, c. 121.

[2] *Ibid.*

[3] Sections 45-6. Some kinds of assets, by their nature or use, do not come under the *Family Relations Act* and are neither family nor business assets: *see, e.g., Underhill* v. *Underhill*, (1983) 45 B.C.L.R. 244 (C.A.).

[4] *Ibid.*

[5] Section 51.

[6] Sections 43, 48.

[7] Section 51.

C. Recent Developments

The potential of the *Family Relations Act* for costly litigation has led to two developments that could resolve many of the law's current problems. First, an informal Family Law Division of the British Columbia Superior Courts has been established on an experimental basis. By specializing, judges in the Family Law Division might be able to make the application of the law governing family matters more consistent and certain.

Second, there is increasing movement away from litigation as a means of resolving family disputes. Many perceive that spouses would be better served if their disputes were settled through mediation rather than litigation. Steps have been taken so that lawyers, and others expert in family law matters, can become accredited mediators.[8] This method of dispute resolution is likely to be swifter, less expensive and less emotionally disruptive to the spouses than the judicial process.

Currently, some spouses resolve their disputes through arbitration, but this method is not significantly different from litigation. In an arbitration the parties are usually represented by lawyers. Instead of a judge, however, the parties agree on an arbitrator to adjudicate. Arbitration may be faster than litigation, but it is frequently just as expensive. Mediation differs from arbitration. A mediator meets with the spouses to discuss their differences and assist them in arriving at a fair resolution of their dispute through negotiation and conciliation.

It remains to be seen whether these two developments will cure the present failings of family law. They represent serious attempts, however, to make family law more predictable and the consequences of marital breakdown less traumatic.

D. Study Paper on Family Property

In October, 1985, the Commission published a document entitled *Study Paper on Family Property*. The Study Paper was prepared for the Commission by Thomas G. Anderson, Counsel to the Commission, and Michael Karton, of the British Columbia Bar. The Study Paper is a comprehensive discussion of the operation of legislation governing entitlement to family property and of case authority on its operation.

The discussion of the law in the *Working Paper on Spousal Agreements* and in this Report are both based on the research conducted for the Study Paper.

E. The Working Paper

This Report was preceded by the *Working Paper on Spousal Agreements*. The Working Paper was given wide circulation among judges, lawyers experienced in family law, and professors of law. A number of responses to the Working Paper were received, and these will be discussed in greater detail later in this Report.

F. Scope of the Report

Our review of the current law discloses that few principles governing the division of family property can be safely regarded as settled. Research on almost any discrete issue will disclose numerous conflicting decisions. Law-

[8] *See Attorney General Statutes Amendment Act (No. 2), 1985*, S.B.C. 1985, c. 65.

yers are unable to advise their clients with certainty. Many issues present open questions that, failing agreement of the parties, can only be answered by a judgment after trial.

The Commission has been monitoring developments under the *Family Relations Act* since its implementation. One aspect of that legislation appears to have been responsible for much of the litigation that has ensued. The nature and effect of agreements made by spouses concerning entitlement to their property is to a large extent uncertain. In this Report we examine the law governing spousal agreements.

CHAPTER II SPOUSAL AGREEMENTS

A. Agreements Under the *Family Relations Act*

1. Agreements Generally

The *Family Relations Act* contemplates that spouses will arrange their respective rights to property in four different ways. They may enter into a contract before or during marriage. This is called a "marriage agreement."[1] On, or in anticipation of, marriage breakdown they may enter into a contract. This is called a "separation agreement." Property interests may also be governed by an "ante or post nuptial settlement." (What is meant by an ante or post nuptial settlement is in many respects uncertain.) Lastly, they may have no contract at all.

Under the *Family Relations Act* a "marriage agreement" relates to spousal entitlement to family assets. It must be in writing, signed by both parties, and witnessed by one or more other persons.[2] The term "marriage agreement", consequently, encompasses separation agreements made observing these formalities of execution. Separation agreements and ante or post nuptial agreements are referred to in the Act but not defined.

Whether or not the spouses have attempted to define their rights by contract, the court has jurisdiction to determine entitlement to maintenance and to family property in a manner inconsistent with the agreement. The source of the court's jurisdiction to do so depends on the category of spousal agreement into which the agreement in issue falls.

2. Separation Agreements

Upon separation, and also in the course of negotiations prior to a divorce, many spouses enter into agreements in which they set out in detail how they have settled some or all of the issues between them. These agreements are often prepared by solicitors and are frequently complex. They generally deal with such issues as maintenance for spouse and children, division of property, custody and access rights, division of debts, education for the children, costs, and use of property owned by the spouses. Most of these agreements contain clauses which provide that the parties release each other from any liabilities other than those contained in the agreement, and relinquish any rights either spouse may have to the assets or income of the other spouse. Another common provision acknowledges that both parties have satisfied themselves that they are fully familiar with the estate of the other spouse and that they have executed the agreement voluntarily and without coercion. Such agreements are generally called "separation agreements."

Under the *Family Relations Act* separation agreements have two important consequences. They evidence marriage breakdown and trigger entitlement to family assets. The statutory entitlement to family assets is also subject to the terms of a separation agreement.

3. What is a Separation Agreement?

It cannot be stated with any assurance what must be covered in an agreement or what formalities must attend its execution so that it qualifies as a

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[1] The Act provides that certain formalities must be observed to ensure that a marriage agreement is binding even in the absence of consideration. This approach leaves in some doubt the status of agreements made before or during marriage which do not comply with the required formalities; *see*, however, *Welch* v. *Welch*, [1985] B.C.D. Civ. 1680-04 (S.C.); *Re Gossman and Gossman*, (1985) 34 A.C.W.S. (2d) 455 (B.C.S.C.); *Campbell* v. *Campbell*, (1985) 47 R.F.L. (2d) 392 (Ont. H.C.).

[2] Subsections 48(2) and (3).

separation agreement within the meaning of the Act. In *Haaf* v. *Haaf*,[3] for example, it was held that a separation agreement need not be in writing. In *Rutherford* v. *Rutherford*,[4] however, Seaton J.A. said that:

> [T]his Act, when it refers to a separation agreement, contemplates something more than an oral agreement to live apart.

He continued:[5]

> It would be unlikely that a casual agreement — 'Shall we separate?' 'Yes—let's.' — would belong in that company. It follows that to be a separation agreement the arrangement must be a formal one. I do not go so far as to say that it must be in writing.

Craig J.A. disagreed. He said:[6]

> I think the phrase [separation agreement] comprehends any situation in which the parties have agreed to live apart notwithstanding the fact that they have not settled all the terms upon which they will live apart.

The issue of what constitutes a separation agreement within the meaning of section 43(1)(a) of the *Family Relations Act* has generated some confusion. The issue has significance only with respect to whether a triggering event has occurred vesting rights in the spouses to family property. Other triggering events relate to marriage breakdown. It is likely, consequently, that the reference to separation agreement contemplates no more than any agreement which recognizes the fact of separation, or in which the spouses agree to separate. The importance of such an agreement relates to whether it establishes marriage breakdown. There would appear to be no objection in principle to characterizing an oral agreement to separate as a separation agreement within section 43(1)(a). The only concern is whether there is satisfactory evidence of such an agreement.

The first reason for confusion, consequently, is that the *Family Relations Act* uses the term "separation agreement" in a special sense. The second reason for confusion is that many people think of a separation agreement as being different from a marriage agreement or an ante nuptial settlement. Under the *Family Relations Act*, however, a separation agreement is characterized as either a marriage agreement or ante nuptial settlement depending on the formalitites observed in making the agreement.

B. Jurisdiction to Vary Spousal Entitlement to Property

Two sections of the *Family Relations Act* provide the courts with jurisdiction to vary interests in property. Section 51 applies in the absence of an agreement, or where the parties have entered into a marriage agreement. Section 54 applies to "an ante nuptial or post nuptial settlement that is not a marriage agreement."[7] On the face of the Act, there is a gap. What jurisdiction has a court to vary an agreement which is neither a "marriage agreement" nor "an ante nuptial or post nuptial settlement that is not a marriage agreement?" As it turns out, section 54 has been interpreted so that virtually any agreement relating to property that is not a marriage agreement will be characterized as an ante nuptial or post nuptial settlement.

Section 54 is based upon section 5 of the English *Divorce and Matrimonial Causes Act*[8] which provided as follows:

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[3] [1981] B.C.D. Civ. 1645-16 (S.C.).
[4] (1981) 30 B.C.L.R. 145, at 153, 23 R.F.L. (2d) 337 (C.A.).
[5] *Ibid.*
[6] *Ibid.*, at 161; *see also Paulovich* v. *Paulovich*, [1984] B.C.D. Civ. 1676-05 (S.C.).
[7] Subsection 54(1).
[8] 22 & 23 Vict., 1859, c. 61.

As to marriage settlements of parties after final decree of nullity of marriage

5. The Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit.

This section was enacted two years after the English *Divorce and Matrimonial Causes Act* of 1857. It was designed to meet a specific problem. Frequently, on marriage, property would be settled on one or both spouses, or on a trustee for the benefit of one or both spouses. For example, an ante nuptial settlement might be used to settle property in trust for the spouses by their parents. As a condition of the marriage, the husband might settle property in trust for the wife. The terms of a settlement were often inappropriate in the circumstances following marriage breakdown. Without specific authority, courts could not vary the terms of a settlement.

The word "settlement," at law, is a term of art, narrowly defined to mean a formal arrangement of specific interests in real or personal property generally held in trust. A narrow definition of "settlement" in section 5, however, did not answer the problems that arose in many arrangements made between spouses or by a third party on behalf of the spouses. The courts, consequently, gave the word "settlements" in section 5 a wide interpretation.[9] The word, in this context, was not precisely defined beyond the requirement that it refer to an arrangement made between or to one or both spouses *because of their status as spouses*.[10] The section was not intended to vary agreements between spouses made in anticipation of the dissolution of their marriage. It was intended to vary arrangements made by parties who expected the marriage to endure, the terms of which were rendered inappropriate by marriage dissolution.

Whether the practice of the courts in using section 5 of the English Act (or section 54 of the British Columbia *Family Relations Act*) to vary the terms of separation agreements is legitimate is certainly open to question. Nevertheless, shortly after the enactment of section 5, it was construed to apply to a separation agreement.[11]

The manner in which section 54 and its predecessors have been interpreted confers on the courts a broad jurisdiction to vary the division of property settled in spousal agreements. There was accordingly no specific need to provide a coordinate jurisdiction that provisions of a marriage agreement could be varied under section 51 of the *Family Relations Act*.

It should be observed that before enactment of the current *Family Relations Act* very few applications were made to vary the terms of separation agreements relating to division of property. The courts were reluctant to interfere with contracts freely entered into. Enacting a general rule that spouses on marriage breakdown are entitled to equal shares in family property changed all that. That rule appears to have altered fundamentally the attitude of courts to all spousal agreements.

C. Sections 51 and 54 of the *Family Relations Act*

When a court is asked to review a spousal agreement relating to property, one might guess that it would be fairly straightforward to determine whether

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[9] *Bosworthick* v. *Bosworthick*, [1927] P. 64 (C.A.); *see also Link* v. *Link*, [1983] B.C.D. Civ. 1673-01 (S.C.).
[10] *Melvill* v. *Melvill and Woodward*, [1930] P. 159 (C.A.).
[11] *Stone* v. *Stone and Brownrigg*, (1864) 3 Sw. & Tr. 372, 373; 164 E.R. 1319.

courts were to rely on jurisdiction under section 51 or section 54. If the agreement qualifies as a "marriage agreement," the court's jurisdiction is found in section 51. Any other agreement relating to property falls under section 54.

In practice, the resolution of this issue has proved to be fairly straightforward, although some courts have adopted irreconcilable approaches. To understand the nature of the problem, some appreciation of the distinctions between sections 51 and 54 is called for. The following discussion contrasts these two sections.

1. SECTION 51

Section 51 of the *Family Relations Act* provides as follows:

> **Judicial reapportionment on basis of fairness**
>
> **51.** Where the provisions for division of property between spouses under section 43 or their marriage agreement, as the case may be, would be unfair having regard to
>
> (a) the duration of the marriage;
>
> (b) the duration of the period during which the spouses have lived separate and apart;
>
> (c) the date when property was acquired or disposed of;
>
> (d) the extent to which property was acquired by one spouse through inheritance or gift;
>
> (e) the needs of each spouse to become or remain economically independent and self sufficient; or
>
> (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,
>
> the Supreme Court, on application, may order that the property covered by section 43 or the marriage agreement, as the case may be, be divided into shares fixed by the court. Additionally or alternatively the court may order that other property not covered by section 43 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

Under this section the court may consider and vary entitlement to any property owned by either or both spouses.[12] The courts are empowered to reapportion entitlement to property if the provisions in question are "unfair" having regard to specific criteria listed in the section. Category (f) ("any other circumstances. . .") appears to be quite broad. In the first several years following enactment of the *Family Relations Act*, the courts tended to take a restrictive view of the variables that it could consider on an application for variation under section 51.[13] More recently, courts have relied upon subsection 51(f) to take into account a wide number of factors when determining whether to reapportion entitlement to family property.[14]

2. SECTION 54

Section 54 of the *Family Relations Act* provides as follows:

> **Variation of marriage settlements**
>
> **54.** (1) This section applies to an ante nuptial or post nuptial settlement that is not a marriage agreement under this Part.

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[12] In *Bales* v. *Bales*, [1985] B.C.D. Civ. 1652-02 (S.C.) it was held that the court has no jurisdiction under s. 51 where re-division is not sought. The applicant spouse requested possession of the matrimonial home. Jurisdiction to divide property not covered by s. 43 or by a marriage agreement (non-family assets) is narrowly confined. Non-family assets may not be divided, for example, only because there are no family assets to divide. Non-family assets may be divided where practical considerations dictate that particular family assets should not be divided: *O'Riordan* v. *O'Riordan*, (1985) 46 R.F.L. (2d) 180 (B.C.S.C.).

[13] *Schlatter* v. *Schlatter*, (1982) 41 B.C.L.R. 278 (C.A.); *Baird* v. *Baird*, (1981) 33 B.C.L.R. 77, 25 R.F.L. (2d) 17 (C.A.); *Girard* v. *Girard*, (1983) 42 B.C.L.R. 305 (C.A.); *cf. Akerib* v. *Akerib*, (1983) 44 B.C.L.R. 75 (S.C.).

[14] *See, e.g., Douglas* v. *Douglas*, (1984) 43 R.F.L. (2d) 262 (B.C.S.C.); *Stewart* v. *Stewart*, (1984) 56 B.C.L.R. 375 (C.A.); *Murphy* v. *Murphy*, (1984) 44 R.F.L. (2d) 60 (B.C.S.C.).

(2) The Supreme Court may, on application, not more than 2 years after an order for dissolution of marriage, for judicial separation or declaring a marriage null and void, inquire into an ante nuptial or post nuptial settlement affecting either spouse and, whether or not there are children, make any order that, in its opinion, should be made to provide for the application of all or part of the settled property for the benefit of either or both spouses or a child of a spouse or of the marriage.

(3) The Supreme Court may, on application, where circumstances warrant, extend the period during which an application may be made or power exercised under this section.

Under this section the court may only look to "the settled property." It may not consider or vary entitlement to family assets not mentioned in the agreement in question. In this respect, section 54 confers a much narrower jurisdiction on the courts than does section 51. In other respects, however, the jurisdiction conferred by section 54 is broader than that provided by section 51.

Section 54(2) provides, for example, that the court may order that all or part of the settled property be used for the benefit of a child of a spouse. No comparable power is offered by section 51.[15] Moreover, the court's discretion under section 54 is unconfined. It may make any order that is appropriate in the circumstances.[16] Under section 51, the court's consideration is confined to listed items.[17]

D. Is There a Need for Two Separate Sections to Empower the Courts to Reapportion Entitlement to Property?

The relationship between sections 51 and 54 has led to some confusion. In large measure this confusion results from a belief that agreements identical in substance should not be subject to different standards depending on the category of agreements into which they fall. Some courts have tried to interpret the Act so that separation agreements, however they are made, are reviewed according to a single standard.

Case authority on this issue, however, appears to be fairly clear. Separation agreements which comply with all the formal and substantive requirements of a section 48 marriage agreement are reviewable under section 51.[18] Separation agreements which do not qualify as marriage agreements are reviewable under section 54.[19]

The courts have experienced some difficulties in characterizing the nature of the agreement to determine the source of their jurisdiction to reapportion property interests. In *Britney* v. *Britney*,[20] for example, it was held that an agreement which complied with the formalities required for a marriage agreement was not a marriage agreement since it was concerned mostly with custody and maintenance. Section 48 defines a marriage agreement as an agreement that relates to the management or ownership of family assets. In *Kramer* v. *Kramer*[21] it was held that section 54 cannot apply to

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[15] The court may, however, order property be held in trust for the benefit of children of the marriage under s. 52.

[16] *Divinsky* v. *Divinsky*, (1970) 2 R.F.L. 372 (B.C.S.C.); *Maricic* v. *Maricic*, (1981) 27 B.C.L.R. 157 (S.C.); *Goodman* v. *Goodman*, (1981) 23 B.C.L.R. 175, 19 R.F.L. (2d) 415 (S.C.).

[17] *Thomas* v. *Thomas*, (1981) 29 B.C.L.R. 348, 23 R.F.L. (2d) 244 (S.C.); *Schlatter*, *supra*, n. 13; *Baird*, *supra*, n. 13; *Girard*, *supra*, n. 13.

[18] *Swanson* v. *Swanson*, (1983) 34 R.F.L. (2d) 155 (B.C.S.C.); *Sutton* v. *Sutton*, (1981) 29 B.C.L.R. 37 (S.C.); *Gwynn* v. *Forsythe*, (1982) 40 B.C.L.R. 358, 31 R.F.L. (2d) 188 (S.C.), *var'd* (1985) 45 R.F.L. (2d) 86 (C.A.); *Minckler* v. *Minckler*, (1982) 41 B.C.L.R. 356 (S.C.).

[19] *Goodman*, *supra*, n. 16; *Mirus* v. *Mirus*, (1980) 19 B.C.L.R. 193, 15 R.F.L. (2d) 152 (S.C.); *Voth* v. *Voth*, [1981] B.C.D. Civ. 1680-03 (S.C.), aff'd. (1982) 31 R.F.L. (2d) 442 (C.A.); *Acorn* v. *Acorn*, (1980) 15 R.F.L. (2d) 257 (B.C.S.C.); *Cruse* v. *Cruse*, [1983] B.C.D. Civ. 1680-02 (S.C.) (agreement executed prior to the Act); *Maricic*, *supra*, n. 16.

[20] [1982] B.C.D. Civ. 1680-06 (S.C.).

[21] (1984) 49 B.C.L.R. 184, 36 R.F.L. (2d) 297 (S.C.).

separation agreements. Section 54 refers to post or ante nuptial settlements. A separation agreement has nothing to do with marriage, but concerns itself with separation and divorce.

In some cases, the courts seem to have overlooked the importance of classifying the nature of the agreement in question. They have applied section 54 without any apparent consideration of whether the section was applicable.[22]

It has also been held that it is irrelevant which section applies to the agreement in question, since the court enjoys the same jurisdiction under either to vary the agreement if it is unfair.[23] As we have seen, the jurisdictions differ in several important respects.

The cases suggest that the existence of two sections dealing with essentially the same matter is needlessly confusing. Arguments may be raised to justify treating formal agreements differently from informal agreements, and there may be merit in distinguishing between agreements made before marriage breakdown and those made after. It is difficult to see, however, why the court should not exercise essentially the same jurisdiction whatever agreement is before it. As it stands, the source and nature of that jurisdiction varies depending on which formalities were observed when the agreement was made.

E. The Concept of Fairness Under the *Family Relations Act*

Section 51 of the *Family Relations Act* provides that the courts may reapportion a division of property under a marriage agreement if its terms are unfair. What is meant by "unfair" is open to question. Some courts interpret "unfair" to mean improvident from the perspective of one party to the agreement.[24] Other courts apply a more restrictive approach. They require that the contract be unconscionable at common law before it will be "unfair" within the meaning of section 51.[25] The Act provides little guidance on the meaning of "unfair."

Courts which require proof of unconscionability are reluctant to interfere with the settled affairs of the spouses. The agreement might be unfair in the sense that the court would have divided the property differently in the absence of the agreement. Nevertheless, courts have refused to vary an agreement if its terms were clearly understood,[26] it was intended by both parties to conclude their statutory and legal rights,[27] or it was relied upon by the parties in conducting their own affairs[28] or settling other aspects of the dispute between them.[29]

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[22] *Supra*, n. 19.

[23] *Allan* v. *Allan*, [1982] B.C.D. Civ. 1698-01 (S.C.).

[24] *See, e.g., Minckler, supra*, n. 17; *Swanson, supra*, n. 18; *Ford* v. *Ford*, (1983) 37 R.F.L. (2d) 132 (B.C.S.C.); *Martiniuk* v. *Martiniuk*, [1986] B.C.D. Civ. 1680-02 (B.C.S.C.); *Berky* v. *Berky*, (1985) 35 A.C.W.S. (2d) 205 (B.C.S.C.). *See also Gwynn, supra*, n. 18, at 90, where Hutcheon J.A. commented:

> One starts with the premise underlying the statute: apart from any agreement about division of property each party is entitled to a one-half interest in family assets. That is the standard against which any alleged unfairness in the agreement is to be measured.

[25] *MacKay* v. *MacKay*, [1981] B.C.D. Civ. 1631-04 (S.C.); *Good* v. *Good*, [1981] B.C.D. Civ. 1631-03 (S.C.); *See also Green* v. *Green*, (1982) 36 B.C.L.R. 48 (S.C.); *Dodds* v. *Dodds*, [1980] B.C.D. Civ. 1680-08 (S.C.); *Kozar* v. *Kozar*, (1982) 28 R.F.L. (2d) 135 (B.C.S.C.), where a provision that the husband will buy out the wife over six years without interest was held to be not sufficiently unfair to overturn the contract; *Sands* v. *Sands*, [1985] B.C.D. Civ. 1631-04 (S.C.).

[26] *Acorn, supra*, n. 19; *Vanstone* v. *Vanstone*, (1983) 33 R.F.L. (2d) 426 (B.C.S.C.).

[27] *Ibid. See also Hill* v. *Hill*, (1981) 23 R.F.L. (2d) 431 (B.C.S.C.); *O'Shaughnessy* v. *O'Shaughnessy*, [1985] B.C.D. Civ. 1695-02 (S.C.).

[28] *Townsend* v. *Townsend*, (1983) 37 R.F.L. (2d) 46.

[29] *Little* v. *Little*, (1982) 29 R.F.L. (2d) 370 (B.C.S.C.).

In *Vanstone* v. *Vanstone*,[30] for example, it was held that where the spouses understood the terms of an agreement and consented to those terms at trial, the court will not set that agreement aside.[31] It was said that a compromise cannot be set aside unless counsel acted under a misapprehension.

In *Townsend* v. *Townsend*[32] the parties signed a separation agreement in 1980 after 18 years of marriage. The agreement did not mention pension rights. The wife applied for an interest in her husband's pension. It was held that the wife was not entitled to any claim to the pension because the husband had relied on the separation agreement in taking early retirement. *Little* v. *Little*[33] also involved an application by a wife for a share in her husband's pension. The husband testified that if the original agreement had given his wife an interest in his pension, then a different agreement respecting maintenance would have been made. These cases appear to refuse variation of agreements on the ground of an estoppel.[34]

In *Stevens* v. *Stevens*[35] the British Columbia Court of Appeal held that a separation agreement overrides any other rights a spouse may have to family assets. General words in an agreement that the parties will each keep his or her own assets are sufficient to exclude a subsequent claim to family assets. This case does not appear to have altered the approach courts take to varying agreements respecting family property. It seems to have been restricted to its facts, since it involved a separation agreement made before the current *Family Relations Act* was implemented.

These differences in approach, which in turn lead to differences in result, follow from the imprecision of the word "unfairness" in section 51 of the *Family Relations Act*.

1. Factors Which Demonstrate Unfairness

The different approaches courts have adopted to their jurisdiction to vary agreements relating to property are often reflected in the factors found to be relevant in determining whether an agreement is unfair.

Courts which assume a broad jurisdiction to vary entitlement to property will often intervene when an agreement does not correspond with the division they would have ordered.[36] When such an approach is taken, the fact of unequal division may, in itself, be regarded as evidence of unfairness.[37]

Courts which interpret "unfair" to mean "unconscionable" require more than an unequal division of property. They look for signs of inequality of bargaining power.[38] The concept of "inequality of bargaining power," however, has been interpreted more broadly in spousal disputes than it has been in commercial contexts. In *Worobieff* v. *Worobieff*,[39] for example, the court looked to the emotional state of the parties. It was held that guilt or

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[30] *Supra*, n. 26.

[31] In *Vanstone*, *supra*, n. 26, the wife applied to set the contract aside on the ground that she did not agree to it. This application, consequently, differs from an application to set a contract aside or to vary it on the ground that it is unfair. The court stated that it could not intervene.

[32] *Supra*, n. 28.

[33] *Supra*, n. 29.

[34] *See*, however, *Strachan* v. *Strachan*, [1986] B.C.D. Civ. 1680-01 (C.A.) where it was held that laches, acquiescence or estoppel could not deprive the court of jurisdiction under s. 51 to vary an unfair agreement.

[35] (1982) 41 B.C.L.R. 51, 31 R.F.L. (2d) 90 (C.A.).

[36] *See*, *e.g.*, *Swanson*, *supra*, n. 18.

[37] *Jones* v. *Jones*, [1982] B.C.D. Civ. 1680-04 (S.C.); with respect to maintenance, *see Willis* v. *Willis*, (1983) 34 R.F.L. (2d) 212 (B.C.S.C.). *See also Mirus*, *supra*, n. 19; *McCallum* v. *McCallum*, [1982] B.C.D. 1698-03 (S.C.); *Britney*, *supra*, n. 20; *Colbow* v. *Colbow*, [1982] B.C.D. Civ. 1680-02 (S.C.), where the division was unequal, but both spouses sought legal advice, negotiations took six months and the wife refused to take the advice of her solicitor; *Gwynn*, *supra*, n. 18.

[38] *See*, *e.g.*, *Jones*, *ibid.*

[39] (1980) 19 B.C.L.R. 241, 109 D.L.R. (3d) 179 (S.C.).

another motive for accepting less than half of the assets must be considered in determining whether the agreement is fair.

Courts which interpret "unfair" to mean "unconscionable" favour finality. They are usually unmoved by the fact of a bad bargain.[40] An agreement is fair if understood by the parties to it and freely entered into.[41]

2. Summary

The foregoing discussion reveals inconsistencies in the law governing variation of spousal agreements relating to family property. These inconsistencies stem from the nature of the provisions of the *Family Relations Act*.

The purpose behind the *Family Relations Act* may be understood in either of two ways. First, the legislature may have intended that family property, as a general rule, should be shared equally, whether or not spouses have turned their minds to that issue.[42] A broad jurisdiction to vary spousal agreements would be consistent with such an interpretation.

Alternatively, and more likely, the *Family Relations Act* was intended to provide for the division of property where the spouses cannot agree on how that is to be done. The jurisdiction to supervise and vary spousal agreements should then be narrow, confined to ensuring one spouse has not taken advantage of another spouse. An agreement which divides property unequally is not for that reason unfair. There must be something more which renders the agreement unfair and calls for court intervention.

F. Variation of Maintenance Provisions in Agreements

So far our discussion has focused on issues arising out of the division of family property on marriage breakdown. Support obligations present separate, but related, problems. A spouse who receives a significant share of property may no longer require maintenance, or may require less than if he or she had received no share of property. Consequently, there is a link between entitlement to family property and entitlement to maintenance.

Under section 61 of the *Family Relations Act* the court enjoys an unfettered discretion to determine what constitutes adequate maintenance, and to order its payment, whatever the terms of a spousal agreement. Under section 11 of the *Divorce Act*,[43] and under the provisions of the *Divorce Act, 1985*,[44] the court has a similar jurisdiction over maintenance awarded on divorce. The court, however, has no jurisdiction to vary the provisions of an agreement relating to maintenance. Its order as to maintenance, apparently, takes the place of the contractual provisions.

The jurisdiction to review maintenance agreements is of interest in several respects. This jurisdiction is often invoked when the fairness of a division of family property is reviewed. Although the principles which govern these separate jurisdictions differ, there has inevitably been some interaction. The result is that the former law governing variation of maintenance obligations has been altered.

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[40] *Clark* v. *Clark*, [1983] B.C.D. Civ. 1697-01 (S.C.).

[41] *Ibid*; *Little*, *supra*, n. 29; *Stevens* v. *Stevens*, (1982) 41 B.C.L.R. 51, 31 R.F.L. (2d) 90 (C.A.); *Hill*, *supra*, n. 27 (a pension plan case); *MacKay*, *supra*, n. 25, where the contract was not set aside because it was "realistic;" *Dodds*, *supra*, n. 27; *see also McCallum*, *supra*, n. 37.

[42] *Supra*, n. 24; *see also Bawtinheimer* v. *Bawtinheimer*, (1985) 68 B.C.L.R. 234 (C.A.). This position appears to reflect the consensus of the community. A recent poll indicates that, nationally, 75% of Canadians believe that all assets accumulated during the marriage should be divided equally between the spouses on divorce. In British Columbia, 77% endorsed that position: *see Ottawa Citizen*, May 22, 1986.

[43] R.S.C. 1970, c. D-8.

[44] S.C. 1986, c. 4.

1. The Former Law

Prior to the enactment of the current *Family Relations Act* the law governing variation of separation agreements was somewhat complex, but its broad outlines were clear enough. Anyone who considered an application for maintenance inconsistent with the terms of a separation agreement had to first consider the general judicial attitude toward varying maintenance obligations.

The courts routinely cautioned that, while they had the jurisdiction to vary maintenance obligations, there were few circumstances in which they would do so. Applications to set aside or vary any aspect of a maintenance agreement were seldom successful. That attitude was forcefully stated in *Dal Santo* v. *Dal Santo*:[45]

> It is of great importance not only to the parties but to the community as a whole that contracts of this kind should not be lightly disturbed. Lawyers must be able to advise their clients in respect of their future rights and obligations with some degree of certainty. Clients must be able to rely on these agreements and know with some degree of assurance that once a separation agreement is executed their affairs have been settled on a permanent basis. The courts must encourage parties to settle their differences without recourse to litigation. The modern approach in family law is to mediate and conciliate so as to enable the parties to make a fresh start in life on a secure basis. If separation agreements can be varied at will, it will become much more difficult to persuade the parties to enter into such agreements.

Although the policy of the law was straightforward, its application was not. The courts, for example, treated provisions in separation agreements with respect to maintenance, custody and access of children as in no way restraining them from doing what they saw fit in their capacity as *parens patriae*.[46]

Most applications to overturn separation agreements concerned the provisions for maintenance for the wife.[47] The courts both before and after the Act have treated the provisions of separation agreements respecting property differently from those concerning maintenance for the spouse. In *Hill* v. *Hill*[48] Darling L.J.S.C. declined to vary the property provisions in an agreement executed prior to the Act under which the wife received no portion of the husband's pension. He did, however, vary the maintenance provisions respecting both the wife and the child. He said:[49]

> In this area I think the settled law of the country takes a different approach. . . It is this: that provisions in a separation agreement are not sufficient to oust the jurisdiction of the court to . . . [do] what it thinks proper under the circumstances with respect to maintenance both for a wife or child.

This does not mean that wherever a wife sought to vary the maintenance obligations provided by agreement she stood a good chance of success. In general, it seems fair to say that cases such as *Hunt* v. *Hunt*,[50] where Ruttan J. declined to vary an agreement under which the wife received no maintenance, notwithstanding a fairly dramatic change of circumstances, appear to have been the rule rather than the exception.

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[45] (1975) 21 R.F.L. 117, at 120 (B.C.S.C.); *see also Woods* v. *Woods*, (1975) 22 R.F.L. 370, at 379 (Ont. H.C.); *Taylor* v. *Taylor*, (1978) 8 R.F.L. (2d) 70 (Ont. C.A.); *Dal Santo* has most recently been endorsed by the British Columbia Court of Appeal in *Pelech* v. *Pelech*, (1985) 61 B.C.L.R. 217, 45 R.F.L. (2d) 1 (C.A.). *Pelech* is currently before the Supreme Court of Canada.

[46] *Makins* v. *Makins*, (1978) 2 R.F.L. (2d) 104 (Ont. U.F.C.); *Krueger* v. *Taubner*, (1974) 17 R.F.L. 86 (Man.Q.B.).

[47] *Snively* v. *Snively*, (1971) 6 R.F.L. 75, at 80 (Ont. H.C.); *Wong* v. *Wong*, (1972) 8 R.F.L. 345 (B.C.S.C.); *Sherwood* v. *Sherwood*, (1980) 18 R.F.L. (2d) 200 (Ont. U.F.C.); *Morrow* v. *Morrow*, (1974) 44 D.L.R. (3d) 711 (N.S.S.C., Ap. Div.).

[48] *Supra*, n. 27.

[49] *Ibid*, at 437.

[50] (1974) 18 R.F.L. 376 (B.C.S.C.).

2. The Current Law

It had become clear, even before the *Family Relations Act*, that the courts have a continuing jurisdiction to vary the order made on divorce in respect of maintenance for children or spouse.[51] This jurisdiction exists even where a wife waives her rights to maintenance in a separation agreement.[52] Any doubt on this aspect of the court's jurisdiction was put to rest in *Goldstein* v. *Goldstein*,[53] where it was held that, insofar as maintenance provisions in a separation agreement are concerned, the parties could not oust the jurisdiction of the court "to regulate, as a matrimonial matter, the affairs of husband and wife and children."[54]

In *Ferguson* v. *Douglas*[55] the provisions of a separation agreement governing maintenance were incorporated into the decree *nisi*. Later, the wife applied to vary the maintenance provisions pursuant to section 11 of the *Divorce Act*. Proudfoot J. held that the wife was entitled to do this and referred the matter of *quantum* to the registrar. The husband objected that the wife, aside from being barred by the agreement, had lived pursuant to its terms for 13 years. It was held that these facts were matters for the registrar to consider.

In another case[56] it was held that where the agreement provided for maintenance for life, and that agreement was incorporated into the decree *nisi*, then cases such as *Dal Santo* have no application. The jurisdiction of the court to vary a decree *nisi* pursuant to the *Divorce Act* is independent of its jurisdiction to vary agreements.[57]

Other courts have adopted a much narrower approach to this issue. In *Good* v. *Good*[58] the court was faced with a separation agreement which provided for maintenance of the wife. At the divorce hearing, which had been undefended, counsel for the petitioner asked for and received an order dismissing the claim for maintenance. After the divorce, a problem arose. The agreement, which had been incorporated into the decree *nisi*, provided that all enforcement was to go through family court. Both counsel took the position that the family court's jurisdiction had ended upon the entry of the decree *nisi*. The wife sought to amend the maintenance order in the decree *nisi* to include the maintenance which had previously been agreed to, in order to launch enforcement proceedings. Spencer L.J.S.C. held that since the wife had by her agreement settled all her rights and claims to corollary relief under section 11 she should not be permitted to depart from it.[59]

3. Links Between Maintenance and Property Division

Although the courts do not have express power to do so, frequently when varying a spouse's entitlement to property they will also order a corresponding variation in support obligations. The courts, without apparent concern whether they have jurisdiction, have not only amended specific provisions in agreements, but deleted provisions, and imposed new obligations on the parties. In this connection there appears to be no distinction between provisions respecting maintenance and those respecting property.

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[51] *Malcovitch* v. *Malcovitch*, (1978) 91 D.L.R. (3d) 594 (Ont. H.C.); *Caldecott* v. *Caldecott*, (1970) 71 W.W.R. 470 (B.C.S.C.); *Wong*, *supra*, n. 47.

[52] *See Malcovitch*, *ibid*, for a full discussion.

[53] (1976) 67 D.L.R. (3d) 624 (Alta. C.A.).

[54] *Ibid*, at 630; *see also Posener* v. *Posener*, (1981) 29 B.C.L.R. 64, 123 D.L.R. (3d) 493 (S.C.); *Good*, *supra*, n. 25, *Loblowitz* v. *Loblowitz*, [1980] B.C.D. Civ. 1680-07 (S.C.); *Coray* v. *Coray*, [1983] B.C.D. Civ. 1622-03 (S.C.).

[55] [1983] B.C.D. Civ. 1635-04 (S.C.).

[56] *Morrow* v. *Morrow*, (1980) 18 R.F.L. (2d) 374 (B.C.S.C.).

[57] *See also McKenzie* v. *McKenzie*, [1980] B.C.D. Civ. 1635-04 (S.C.).

[58] *Supra*, n. 25.

[59] *Dal Santo* v. *Dal Santo*, *supra*, n. 45, was relied on. If the wife cannot enforce the agreement in family court, it was held, then she could launch an action for breach of contract.

In *Maricic* v. *Maricic*[60] Wetmore L.J.S.C. held that:

(1) The court has a broad discretion to vary separation agreements (in this instance, under section 54);

(2) When exercising this discretion, the court can look at "items of set-off" arising outside the agreement; and

(3) The court may vary entitlement to property and to maintenance.

In *Goodman* v. *Goodman*[61] the agreement gave the wife the right to stay in the home until remarriage. Esson J. held that this provision was unfair. He varied the agreement to specify that the wife was entitled to remain in the home only until the youngest child reached the age of 19 and then, since her right to occupation of the home had been restricted, ordered the inclusion of a maintenance provision in the decree *nisi* so that the court could vary it later if circumstances changed. In *Gwynn* v. *Forsythe*[62] the court varied the agreement made between the parties with respect to maintenance, the division of property and the rights of the wife in the event of the husband's death.

Some cases suggest that the court can vary an agreement which it finds unfair and, in order to "equalize" the distribution of assets, the court can order a spouse to transfer land and to make a lump sum payment of maintenance.[63] The British Columbia Court of Appeal, however, has held this to be improper.[64]

G. Other Grounds for Varying a Spousal Agreement

The courts have identified three specific factors, the existence of any one of which will likely lead to variation of a spousal agreement. The paralleling development of the court's jurisdictions to vary entitlement to maintenance and to family property is noticeable here as well.

1. Change of Circumstances

Jurisdiction to vary maintenance obligations is based primarily on the need of one spouse resulting from change of circumstances rendering the agreement obsolete.[65] While the jurisdiction to vary has survived the Act, the criteria for its exercise seem to have changed. Now, the word "fairness" appears to be cited as frequently as the word "need."[66]

What kind of change of circumstances must be shown before the court will vary a spousal agreement? Prior to the Act, the courts in England and in Canada held that their jurisdiction to vary maintenance provisions in an agreement existed only if there was an *unexpected* change of circumstances.[67]

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[60] *Supra*, n. 16.

[61] *Ibid.*

[62] *Supra*, n. 18.

[63] *See, e.g., Jones*, *supra*, n. 37.

[64] *Rutherford*, *supra*, n. 4.

[65] In *Schwarz* v. *Schwarz*, [1982] B.C.D. 1626-09 (S.C.), for example, the agreement provided that the maintenance provisions would remain in force notwithstanding the dissolution of the marriage or merger of the agreement in the *nisi*. The court held that it had the jurisdiction to alter the maintenance provisions, although it noted that the contract still served as an important indicator of what the parties had thought proper at the time they entered into the agreement. *See also Moul* v. *Moul*, [1983] B.C.D. Civ. 1635-06 (C.A.). The same result was achieved in *Green*, *supra*, n. 25, notwithstanding a clause in the agreement that the wife released and discharged the husband from any liability to pay maintenance. *See also Harding* v. *Harding*, [1981] B.C.D. Civ. 1635-04 (S.C.).

[66] *See, e.g., Campsall* v. *Campsall*, [1983] B.C.D. Civ. 1635-07 (C.A.) which concerned an application to reduce the amount of maintenance being paid. The wife's financial position had improved dramatically. The court dismissed the application because the husband had not provided evidence of his circumstances, and the court could not determine who "received the better of the bargain." The traditional analysis still appears occasionally. In *Farquar* v. *Farquar*, (1983) 1 D.L.R. (4th) 244 (Ont. C.A.), the Ontario Court of Appeal refused to vary an agreement on the ground of changed circumstances. The court ruled that circumstances inevitably change. While changed circumstances is a relevant factor if the agreement is vulnerable on some other basis, it is not by itself a sufficient basis for avoiding an agreement.

[67] *Burns* v. *Burns*, (1963) 38 D.L.R. (2d) 572 (Ont. H.C.).

The consensus was that if a contract was intended to be a final disposition of all obligations, then a foreseeable change of circumstances could not be a reason to disturb the contract.[68]

That logic has almost disappeared from the judgments of the British Columbia courts. Instead, the courts now say that they will alter the contract in *unusual* circumstances.[69] As a result, courts have intervened in cases where the change of circumstances was entirely foreseeable. In *Posener* v. *Posener*,[70] for example, the contract did not provide for a reduction in maintenance, but did provide for an increase. It was held that such an imbalance in the agreement was a proper ground for variation.

The jurisdiction to vary maintenance provisions in separation agreements on the ground of changed circumstances is probably based on necessity. Courts assert that spouses, especially wives, should not be left destitute even if they, by agreement, accepted that risk. This reason for a continuing jurisdiction to review maintenance arrangements does not necessarily justify a similar jurisdiction to vary provisions in agreements dealing with property division. As with authority concerning reapportionment of property, there is a division in cases involving variation of maintenance provisions between courts which are prepared to act on the basis of unfairness and those which are reluctant to intervene and upset settled matters.[71]

Some courts view their jurisdiction to vary property arrangements more conservatively. In *Heslop* v. *Heslop*,[72] for example, it was held that change of circumstances should not be a ground for varying obligations since, if it were, there would be no good reason to go to the trouble and expense of making a separation agreement. This reasoning has much to recommend it.[73]

In most cases "fairness" is analyzed from the perspective of the date of the agreement,[74] an approach approved by the British Columbia Court of Appeal[75] and applied many times.[76] Since property rights and maintenance obligations are to a large extent linked, it is difficult to see how the courts are to determine these issues using different principles respecting variation. Legislative guidance on the significance of change of circumstances is probably desirable.

2. Duty of Disclosure

By 1981 the courts were holding that a spouse owes a duty of "utmost good faith" to the other spouse. Accordingly, if a spouse fails to disclose all facts pertaining to his assets, the agreement may be avoided. A general release clause cannot bar an application to set aside an agreement on the ground of non-disclosure.[77]

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[68] *Malcovitch*, *supra*, n. 51.

[69] *Posener*, *supra*, n. 54; *but see Heslop* v. *Heslop*, (1984) 39 R.F.L. (2d) 322 (B.C.S.C.).

[70] *Ibid. See also Harding*, *supra*, n. 65, for the same result.

[71] *See*, *e.g.*, *Pelech*, *supra*, n. 45.

[72] *Supra*, n. 69.

[73] *See*, *e.g.*, *Pelech*, *supra*, n. 45; *Stokes* v. *Stokes*, (1985) 46 R.F.L. (2d) 207 (B.C.C.A.).

[74] *See*, *e.g.*, *Mirus*, *supra*, n. 19, where it was open to the judge to vary an agreement by granting *nisi* and varying under section 11, but he declined to do so because the agreement was fair at the time it was made.

[75] *Ioannidis* v. *Ioannidis*, (1982) 39 B.C.L.R. 368, 30 R.F.L. (2d) 362 (C.A.).

[76] *See*, *e.g.*, *Willis*, *supra*, n. 37, where a contract was varied by erasing maintenance payments and arrears because the agreement was unfair, in that the husband was obligated to pay maintenance to the wife for life after a very short marriage; *see also Rowley* v. *Rowley*, [1981] B.C.D. Civ. 1631-10 (S.C.); *Clark*, *supra*, n. 40; *Cruse*, *supra*, n. 19; *Gwynn*, *supra*, n. 18.

[77] *Couzens* v. *Couzens*, (1980) 18 R.F.L. (2d) 333 (Ont. Dist. Ct.); *see also Lamers* v. *Lamers*, (1978) 6 R.F.L. (2d) 283 (Ont. H.C.); *Mirus*, *supra*, n. 19; *Kilburn* v. *Kilburn*, (1980) 16 R.F.L. (2d) 306 (B.C.S.C.).

In *Swanson* v. *Swanson*[78] it was held that the duty to act with utmost good faith applies not only to the existence of assets but also to their value. Moreover, where there has been a breach of that duty, the court is empowered to make any order it thinks fair. In *Ford* v. *Ford*[79] the court thought it fair to alter the maintenance portion of an agreement because the wife had been ignorant of the husband's financial affairs at the time she signed the agreement.

Even where there is no question of fraud, and both parties are mistaken as to the extent of the assets in question, the agreement will be set aside if the existence or value of assets is not disclosed.[80] In Ontario, on the other hand, if a spouse does nothing to hide assets from the other spouse, the mere fact of non-disclosure is not a ground for setting the agreement aside.[81]

When preparing a separation agreement, counsel usually attempt to list all property held by both parties. But this is not always done, and in such cases the parties rely on general releases and clauses acknowledging access to all records. These contractual provisions, however, are of limited utility. If a court finds that the non-owning spouse was in fact unaware of the existence or value of an asset it may set the agreement aside.

3. Agreement Does Not Refer to All Assets

Problems may arise even where the parties are fully aware of each other's assets and their value. Frequently, agreements refer only to those assets which are the subject of specific agreement. Rights in other assets are dealt with by general provisions. For example, an agreement may provide that all assets not mentioned in the agreement are to be retained by the party who has possession of them. Alternatively, the absence of any reference may reflect a tacit abandonment of any claim.

Some courts have held that entitlement to an asset not referred to in an agreement may be redistributed pursuant to the Act. Courts have gone so far as to reapportion entitlement to assets which, at the time the agreement was executed, could not have been the subject of a claim by the non-owning spouse. For example, in *Wilson* v. *Wilson*[82] the parties entered into a separation agreement prior to the Act which did not refer to the husband's medical practice. The wife was awarded 50% of that asset. In *Swanson* v. *Swanson*[83] the court varied a separation agreement which, it held, should have dealt with the husband's pension plan. In *Rowley* v. *Rowley*[84] the pension rights of the husband existed at the time of the agreement but no reference was made to those rights. The court decided that the agreement did not bind the spouses because it was "inconclusive."

Other courts have held that failure to mention assets does not constitute a ground to vary an agreement. For example, in *Little* v. *Little*[85] the husband successfully argued that the agreement was silent on the subject of his pension because he agreed to other points on the strength of his pension income. In *Hill*

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[78] *Supra*, n. 18.

[79] *Supra*, n. 24.

[80] *Mirus*, *supra*, n. 19.

[81] *Farquhar*, *supra*, n. 66; *Talarico* v. *Talarico*, (1985) 33 A.C.W.S. (2d) 367 (Ont. C.A.) dismissing appeal from 38 R.F.L. (2d) 375 (Ont. H.C.).

[82] (1983) 37 R.F.L. (2d) 205 (B.C.C.A.); a distinction should be drawn between an agreement silent on the disposition of a particular asset and one which, in error, does not record the disposition agreed to by the spouses. In the latter case, it is open to the courts to rectify the agreement: *see*, *e.g.*, *Stirling* v. *Stirling*, [1985] B.C.D. Civ. 1698-01 (S.C.); *Eaton* v. *Eaton*, (1981) 21 R.F.L. (2d) 322 (Ont. H.C.). In *Pearson* v. *Manning*, [1985] B.C.D. Civ. 1680-07 (S.C.), the wife's mistaken belief that she was not entitled to share business assets led to a variation of the agreement.

[83] *Supra*, n. 18.

[84] *Supra*, n. 76.

[85] *Supra*, n. 29.

v. *Hill*[86] a separation agreement executed in 1975 did not include any reference to the husband's pension plan. The court upheld this agreement in 1981 because it contemplated a conclusion to all statutory and legal rights of the parties to the property of the other.[87]

To be safe, lawyers who draft separation agreements are well advised to refer to every asset owned by a client whether or not that asset is the subject of distribution, both in order to prove disclosure if that should become necessary, and to prove that every asset was the subject of scrutiny and negotiation by both sides. This is an approach which must certainly admit to practical difficulties, but it would appear no other course safely avoids court intervention.

H. Interpretation of Separation Agreements

Sometimes the courts are called upon to interpret separation agreements just as they are called upon to interpret any other kind of agreement. In general, the courts have preferred to adopt a fairly strict approach.

For example, where a contract provided that the husband would pay for the son's religious education, it was held that those words mean that the husband was not liable to pay for the secular portion of the child's education in a religious school.[88] Where an agreement which provided that maintenance is to cease if the wife cohabited "with a male person as though they were man and wife, for a period of not less than 45 days," it was held that the quoted phrase did not contemplate an informal liaison, but an integrated relationship having most, but not necessarily all, of the following elements: financial interdependence, sexual relationship, a common principal residence, obligations to share the responsibilities of running a home, shared use of assets, shared responsibilities for raising children, and an expectation that such interdependence will continue.[89]

Courts have stated that, when interpreting a separation agreement, both the words of the agreement and the result of a particular interpretation on other aspects of the relationship between the parties must be considered. For example, where the agreement was very generous to the wife in respect of maintenance, and where the court varied the agreement in some respects, the court also resolved its own doubts as to whether the contract was intended to survive death (the contract was "binding on their respective heirs, administrators and executors") and varied the agreement to make it clear that all payments except arrears would cease on death.[90]

Even in this area, the courts have come to strikingly differing conclusions. Two examples:

In one case it was held that where an agreement says that the wife may stay in the home until she no longer "requires" it as a matrimonial home, the word "requires" means "needs," and since the children are grown and the wife has sufficient assets, she no longer requires the home and must leave.[91] In another case where the agreement provided that the wife may remain in the home "so long as she shall require the same," it was held that these words mean that the wife has a right to stay in the home as long as she wants to

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[86] *Supra*, n. 27.

[87] The court varied the agreement with respect to maintenance.

[88] *Goldman* v. *Goldman*, [1981] B.C.D. Civ. 1631-06 (S.C.).

[89] *Bellis* v. *Innes*, (1980) 21 R.F.L. (2d) 40 (B.C. Co. Ct.). *See also Hawe* v. *Hawe*, [1981] B.C.D. Civ. 1631-02 (S.C.); *Schwarz* v. *Schwarz*, [1980] B.C.D. Civ. 1631-02 (S.C.); *Easton* v. *Easton*, (1980) 16 R.F.L. (2d) 253 (B.C.S.C.); *Re Renierwick and Renierwick*, (1985) 34 A.C.W.S. (2d) 75 (Ont. H.C.).

[90] *Gwynn*, *supra*, n. 18; *see also* dicta in *Minckler*, *supra*, n. 18.

[91] *Winrob* v. *Winrob*, (1982) 35 B.C.L.R. 268, 26 R.F.L. (2d) 436 (C.A.).

because the husband expected her to stay until a change in circumstances occurred.[92] In a third twist, the parties signed a contract in 1977 which provided that the wife would remain in the home until she remarried. The court simply varied the agreement pursuant to section 54.[93]

The courts have refused to permit evidence respecting the common intention of both parties to interpret a separation agreement.[94] On the other hand, it has been held that the court must go behind the language of the agreement and examine the surrounding circumstances in order to decide what meaning should be given to the words.[95]

The point here is not to determine which of various evidentiary rules should apply to interpreting separation agreements, but rather to demonstrate further the consequences of the uncertain jurisdiction to vary an agreement under the Act. If courts have jurisdiction to vary an agreement on the basis of fairness, they need not resort to legal niceties such as rules of evidence, which only beg the issue of the appropriateness of any variation. On the other hand, if the courts are not to have the power to vary on the ground of "fairness," the Act should spell out specifically when a variation is permitted so that inconsistent decisions do not result from statutory ambiguity or the inconsistent application of evidentiary rules.

I. Agreements Made Before 1979

It is tempting to suggest that the courts are more hesitant to intervene in the case of an agreement made before the introduction of the current Act than in the case of an agreement made after its introduction.

The most important case in this area is *Stevens* v. *Stevens*.[96] An agreement was executed in 1977 and the wife sought to vary the agreement on the ground that, since the Act did not exist at the time she signed the agreement, the triggering event must be the date of the dissolution of the marriage in 1981. Accordingly, the wife claimed that she was entitled to three assets which, under the new Act, were conceded to be family assets. The Court of Appeal agreed that the triggering event was the dissolution of the marriage and not the agreement which pre-existed the Act, but then went on to hold that section 43(3) of the Act, and the agreement itself, "override" her interest in those assets. Moreover, the court held that the general words in the agreement to the effect that the parties shall each retain his or her monies, savings, etc. are sufficient to exclude the claim by the wife without further specific words of release.

This decision suggests that, as a matter of jurisdiction, not discretion, an agreement freely entered into prior to the Act will not be reviewed by the court if the wife has waived her rights to any such relief. If this is correct, then the British Columbia position is the same as the New Brunswick position.[97]

The *Stevens* reasoning has been adopted in other cases. In *Hill* v. *Hill*,[98] for example, a contract executed in 1975 did not include any reference to the husband's pension plan. The court upheld this agreement in 1981 because it

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[92] *Cruse* v. *Cruse*, [1981] B.C.D. Civ. 1680-08 (S.C.). *See also Vanstone*, *supra*, n. 26.

[93] *Goodman*, *supra*, n. 16.

[94] *Keetley* v. *Keetley*, [1981] B.C.D. Civ. 1631-09 (S.C.). Does "income" mean limited to "salary from employment?" *See also Bailey* v. *Bailey*, [1980] B.C.D. Civ. 1680-10 (S.C.), where parol evidence was not allowed for the purpose of modifying an agreement; *and Withrow* v. *Withrow*, (1980) 20 R.F.L. (2d) 115 (B.C.S.C.).

[95] *Winrob*, *supra*, n. 91.

[96] *Supra*, n. 41.

[97] In *Godbout* v. *Godbout*, (1983) 32 R.F.L. (2d) 309, at 315 (N.B.Q.B.), the court held that, notwithstanding a possible reconciliation, since the agreement referred to after-acquired property, the wife "would therefore have no right to claim thereto".

[98] *Supra*, n. 27.

found the agreement contemplated the extinguishment of all statutory and legal rights of the parties to each other's property.[99]

No case specifically states that agreements reached before the Act came into force are to be treated differently from post-Act agreements. However, in many cases in which agreements have been restrictively interpreted, the agreement was executed prior to the Act.

A Saskatchewan case comes very close to a direct statement of judicial policy. In *Poole* v. *Poole*[100] the court held that it must interpret agreements with reference to the law applicable when the agreement was made. Even so, there is British Columbia authority to the contrary. In *Wilson* v. *Wilson*[101] the *Family Relations Act* was found to apply to a pre-Act agreement entered into by the spouses. The agreement did not refer to a doctor's practice. In 1982, that asset was held to be a family asset and the wife was awarded 50% of its value. Yet at the time the agreement was made, under the former *Family Relations Act*, the wife had no interest in the practice.[102]

In *Harding* v. *Harding*[103] Gould J. varied both the terms of a pre-Act agreement and arrears of maintenance under section 54. The British Columbia Court of Appeal has also held that a pre-Act separation agreement is a post nuptial agreement as defined by section 9 of the old Act, and as such can be varied under section 54.[104]

It is open to question whether it is desirable to permit parties to re-open issues settled before new rights were conferred by legislation. Perhaps many of the cases in which an application for variation of an agreement was dismissed turn on the court's unspoken antipathy to the idea of overturning an agreement which was patently fair at the time that it was made, considering the laws then prevailing.

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[99] *See also Ferguson* v. *Douglas*, *supra*, n. 55.

[100] (1981) 23 R.F.L. (2d) 439 (Sask. U.F.C.).

[101] *Supra*, n. 82.

[102] The courts have adopted a similar approach with respect to provisions in pre-Act agreements respecting pension plans. *Clark*, *supra*, n. 40; *Minckler*, *supra*, n. 18.

[103] *Supra*, n. 65.

[104] *Mitchell* v. *Mitchell*, (1981) 33 B.C.L.R. 106, 26 R.F.L. (2d) 97 (C.A.); *see also Posener*, *supra*, n. 54.

CHAPTER III REFORM

A. Introduction

The legislature has decided that spouses should share family property. Unless they otherwise agree, they are entitled to equal shares. But an agreed division of property, or equality in the absence of an agreement, is only a starting point. The courts are empowered to vary entitlement as may be appropriate in the circumstances.

The law has proven to be uncertain. No person can predict the effect a spousal agreement will have, nor what the courts will determine is an appropriate division of family property. The result has been an invitation to litigate disputes concerning family property.

An inquiry into whether the tendency of the *Family Relations Act* to promote litigation can be limited without prejudicing the interests of spouses is called for. That inquiry involves a consideration of the purpose of the *Family Relations Act* as it relates to family property and the proper role of spousal agreements.

B. The *Family Relations Act*

1. Generally

Before and during marriage, few spouses turn their minds to the consequences of marital breakdown. After the marriage has broken down, many spouses are unwilling or unable to deal with these consequences. The common law has limited tools at its disposal to remedy problems that flow from the neglect of spouses to determine their financial interests when the marriage relationship ends. Legislation was called for that provided a means to determine the rights and obligations of spouses when they had failed to do so for themselves. In this respect, legislation was required to serve a purpose analogous to that served by the intestate succession provisions of the *Estate Administration Act*.[1] Such legislation is enacted to transfer property fairly on death when a person fails to make a valid will disposing of all of his estate. Similarly, the *Family Relations Act* provides a *prima facie* disposition of the matrimonial estate in default of agreement.

The *Family Relations Act*, however, goes further than merely providing an appropriate division of property when the parties fail to do so for themselves. It permits the courts to review an agreement and vary it if it is unfair. In that respect, the *Family Relations Act* is similar to the *Wills Variation Act*,[2] which permits the courts to review a will, and vary it if it does not make adequate provision for the deceased's immediate family.

The *Family Relations Act* and the *Wills Variation Act* differ in one important respect. The *Wills Variation Act* confers a jurisdiction on the courts to review unilateral acts. A testator may (and frequently does) make a will in secret. The provisions in a will are not subject to prior negotiation. Spousal agreements are made between two people, who often have legal advice, after full negotiation.One spouse need not sign an agreement which is unfair.

2. Spousal Agreements Under the Act

What was the legislature's intention regarding spousal agreements? Two alternative answers are supported by the wording of the Act:

[1] R.S.B.C. 1979, c. 114.
[2] R.S.B.C. 1979, c. 435.

(1) that they should create a finality; or

(2) that they should form the basis of an on-going relationship (that of separated persons), but that they may not be effective to bar further claims.

Whatever the legislature may have intended, the courts have not consistently adopted one or the other view of the purpose of the Act. When the policy stated in a statute is not clear, the courts cannot be faulted if a clear body of precedent does not emerge.

No one can say from reading the Act what circumstances should be considered relevant in deciding whether the facts of a case call for variation of a spousal agreement. At present, some judges proceed from the perspective that the Act imposes a policy under which equality of division of assets is of paramount importance and the relationship of husband and wife can never be completely severed. Any separation agreement which results in an uneven division of assets, or which attempts to oust the jurisdiction of the court in the future, is suspect. The spouse receiving more than half, or relying on the terms of the agreement to oust the jurisdiction of the court, should have to prove that the inequality is justified. The word "unfair" in section 51 is taken to mean not in accordance with the policy of the Act. The court should strike down any bargain which is unequal simply because it is unequal. The Act arguably justifies this interpretation.

Other judges take different views of the policy of the Act. Some hold that substantial inequality is the test, others that subjective factors are relevant to the issue of fairness, and still others that fairness refers not to the division of assets, but to the intention to settle all the issues between the parties with full knowledge of the estate and prospects of both parties. The Act arguably justifies these interpretations too.

The possibility that advice given to clients will come back to haunt lawyers, perhaps in the form of negligence actions, should not be ignored. Competent lawyers should be able to give accurate advice. If the law is not settled, advice cannot be accurate. The result has proven to be that settlements are harder to achieve.

C. The Value of Agreements

Under the *Family Relations Act*, if spouses cannot agree they may apply to the court for an order dividing property between them. If spouses can agree on the division of property, what advantage over the former law is achieved by permitting a court to review their bargain on the basis of fairness?

In the interests of certainty, traditional contract theory requires that the terms of a contract should be literally enforced, subject only to those defences that attack the validity of the "agreement." Fraud, duress, undue influence, mistake, fraudulent and innocent misrepresentation, and *non est factum* may all vitiate a contract unobjectionable on its face. These vitiating factors are often invoked in cases involving improvident bargains.

Even if a contract is enforceable, courts may employ other rules of contract law to temper the harshness of the bargain. For example, the courts refuse to enforce harsh terms imposed by one party if the weaker party did not have notice of them. Courts may also resort to devices such as implied terms, *contra proferentem* interpretation, collateral warranties or estoppel. These methods are indirect and often unsatisfactory. While ostensibly the courts determine whether there is a valid contract or what its terms are or mean, in

reality the courts are more concerned with trying to ensure fairness between the parties. These methods have obvious limitations.

The courts have a limited jurisdiction to refuse to enforce a contract which is unconscionable in the sense that it is clearly improvident or unreasonable from the perspective of one party to it. This jurisdiction is equitable, and it was originally formulated in the context of bargains made with weaker parties, such as the poor, the ignorant, expectant heirs and reversioners, for inadequate consideration and in the absence of independent qualified advice.[3]

While many people agree that the courts should have jurisdiction to relieve parties from unconscionable bargains, there would appear to be some consensus that this jurisdiction should be limited.[4] As a starting point, there must at least be inequality of bargaining power and this condition would appear to be present in those cases where the courts have set aside an agreement on the ground that it was unconscionable.[5] The courts are ill-equipped and unwilling to rewrite contracts simply because the terms appear to be unfair. The likely consequence of an unfettered jurisdiction to review agreements on the basis of fairness is uncertainty, litigation, and undue interference with legitimate economic activity.

The law provides general rules for resolving disputes and determining rights and obligations. Frequently, parties will wish to define rights and obligations that differ from those stipulated by the law. Contractual arrangements are a means of tailoring the law to the needs of the parties. For this reason, the courts seldom vary contractual obligations freely assumed by the parties.

Under the *Family Relations Act* agreements are reviewable by the courts and may be varied if they are unfair.[6] Underlying this jurisdiction is an assumption that spouses negotiating their differences may not be on an equal footing. One spouse may be in a position to take advantage of the other spouse.

This assumption is probably true. Marriage breakdown is likely to affect spouses emotionally, and one or both may be unable to approach negotiation of their disputes objectively. Some jurisdiction to ensure unfair advantage is not taken of one spouse by another is useful. The problem is that the current *Family Relations Act* does not indicate whether this jurisdiction is limited or unfettered.

D. Review of Spousal Agreements

The *Family Relations Act* provides that marriage agreements relating to family property are reviewable under section 51 and ante or post nuptial settlements are reviewable under section 54. When spouses seek review of a separation agreement, the court must first determine whether it is to be considered under section 51 or section 54.

Although there is a need for some jurisdiction to review spousal agreements, there is no justification for distinguishing between agreements relating to family property based purely on the formalities observed in their making. The *Family Relations Act* should be revised to provide that agreements relating to family property are reviewable according to uniform principles.

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[3] *Fry* v. *Lane*, (1888) 40 Ch. D. 312; *Morrison* v. *Coast Finance Ltd.*, (1965) 54 W.W.R. 257, 55 D.L.R. (2d) 710, 713 (B.C.C.A.).

[4] *See, e.g.*, Waddams, *The Law of Contract* (1977), at 208, 51 and 332; Goff & Jones, *The Law of Restitution* (1978) (2d ed.) 202.

[5] Waddams, *supra*, n. 4 at 332; *Lloyds Bank Ltd.* v. *Bundy*, [1975] 1 Q.B. 326, [1974] 3 All E.R. 757 (C.A.).

[6] *Minckler* v. *Minckler*, (1982) 41 B.C.L.R. 356 (S.C.); *Ford* v. *Ford*, (1983) 37 R.F.L. (2d) 132 (B.C.S.C.).

E. "Unfairness"

Section 51 of the *Family Relations Act* provides the court with the jurisdiction to vary entitlement to property arising under section 43 or pursuant to a marriage agreement. That jurisdiction is to be exercised where the division in question is unfair having regard to listed criteria.

The result is that the *Family Relations Act* vests in the courts a discretion to determine an appropriate division of property, whether or not the spouses have entered into an agreement. This is undesirable. The fact that spouses have entered into an agreement does not alter what would be a fair division of property. It should, however, alter the task before the court.

Where spouses cannot agree on the division of family property some means of resolving their dispute is called for. As a starting point, the Act provides that the property is to be divided equally. The court then has discretion to reapportion property, having regard to the circumstances of the marriage. There is a need for legislation to provide for an appropriate division of property where the spouses have not or cannot agree on that issue. The former law, which left property with its legal owner, was often unfair. Any legislative scheme which provided for an arbitrary division of family property would also have its critics. An unfettered discretion in this respect is probably unavoidable.

Where spouses have entered into an agreement dividing family property the court's initial inquiry should not be to determine a fair or appropriate division of the property. It should be whether interference with the agreement is justified at all.

When parties freely enter into an agreement there are very few reasons for releasing them from it, and many in favour of its enforcement. Agreements let people settle their disputes without litigation. Parties to the agreement and third parties can rely on it. The law should encourage people to negotiate their differences and arrive at reasonable compromises. It is of less significance that the terms of the agreement are unfair if the agreement itself was fairly obtained. Refusing to intervene on the basis of unfairness alone protects all parties who have entered into fair agreements from unrestricted litigation.

Consequently, while an unfettered jurisdiction may be appropriate where no agreement exists, a more limited jurisdiction is called for where the parties have agreed on a division of property.

F. Unconscionability

It is our view that the courts should not vary a spousal agreement relating to family property unless the agreement was not freely entered into. Earlier, we listed circumstances where a court, at common law, would set aside or refuse to enforce an agreement on this ground. For example, a court will set aside an agreement where it was obtained by fraud, duress or undue influence.[7] A contract will also be set aside if it is unconscionable. An unconscionable contract is an agreement made between parties of unequal bargaining power that is substantially unfair and one party has taken advantage of the

[7] *See, e.g., Domenco* v. *Domenco and Ignat*, (1963) 44 W.W.R. 549, 41 D.L.R. (2d) 267 (Man. Q.B.) where it was held that, while the relationship of husband and wife does not give rise to the presumption of undue influence, undue influence may be established where one spouse has little education or knowledge of business matters, and is in ill health and a state of depression.

other.[8] The common law concerning unconscionability is of relatively recent development and its scope is still uncertain.[9]

Section 43 of the *Consumer Protection Act*[10] provides an example of legislation defining unconscionability in consumer transactions involving mortgages. The listed indicia of unconscionability, for the most part, require the court to determine whether a mortgage is unconscionable in the light of the circumstances which existed at the time it was entered into. In contrast, the test of whether the agreement is "harsh" or "adverse" in section 43(e) is not so specific. Perhaps circumstances have changed so that a mortgage which was appropriate when it was made is grossly inequitable at the date of trial. It is uncertain whether that would be sufficient reason to characterize the transaction as unconscionable.

In the context of a division of property, the value of assets may change over time. For example, when the agreement is made, the spouses have a home and stocks. Each is worth about $50,000. The wife receives the home and the husband receives the stocks. After the agreement is made, property values plummet and the value of the stocks increases tenfold. Should the agreement be characterized as unconscionable?

In our view, change of circumstances is in general irrelevant to whether a spousal agreement relating to property is unconscionable. Legislation should clarify that position.

The Saskatchewan *Matrimonial Property Act*[11] provides that property dealt with in an "interspousal agreement" is exempt from distribution, unless the agreement is unconscionable or grossly unfair. The Law Reform Commission of Saskatchewan has recently reviewed their *Matrimonial Property Act* and made tentative proposals for its reform.[12] The Law Reform Commission of Saskatchewan recommended that the courts give effect to an interspousal agreement unless:[13]

> . . . at the time it was entered into it was substantially unfair and was obtained by one spouse having taken unfair advantage of the ignorance, need or distress of the other spouse.

This formulation embodies the approach the courts use to determine whether an agreement is unconscionable and unenforceable. This approach more neatly encapsulates the concept of unconscionability in legislative language than does section 43 of the *Consumer Protection Act*. A minor drafting change, referring to "improper advantage" instead of "unfair advantage", would emphasize the two part test that must be satisfied, before an agreement will be set aside: the agreement must be substantially unfair *and* improperly obtained.

The *Family Relations Act* should provide that a spousal agreement with respect to division of property should not be varied unless the agreement is unenforceable at law or is unconscionable. Legislation should define unconscionability. If the agreement is unconscionable, it should be set aside and an appropriate division of property ordered under section 51. Section 51 should be revised to apply in these circumstances.

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[8] *See, e.g., Morrison* v. *Coast Finance Ltd., supra*, n.3; *Lloyds Bank* v. *Bundy, supra*, n. 5; *Harry* v. *Kreutziger*, (1978) 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.); *cf. National Westminster Bank Plc.* v. *Morgan*, (1985) 135 N.L.J. 254, [1985] 1 All E.R. 821 (H.L.).

[9] *National Westminster Bank Plc., supra*, n. 8.

[10] R.S.B.C. 1979, c. 65, s. 43, as am. S.B.C. 1980, c. 6, s. 20.

[11] S.S. 1979, C. M-6.1, s. 24

[12] *Tentative Proposals For Reform of the Matrimonial Property Act* (1984).

[13] *Ibid.* s.43 (2) of the draft Act.

T. e Commission recommends that:

1. *Section 54 of the* Family Relations Act *be repealed.*

2. *A spousal agreement relating to entitlement to property may not be varied pursuant to section 51 of the* Family Relations Act *unless the agreement*
   - *(a) is unenforceable under a statute or a rule of law; or*
   - *(b) was substantially unfair at the time it was entered into and was obtained by one spouse having taken improper advantage of the ignorance, need or distress of the other spouse.*

One correspondent advised that section 54 was included in the *Family Relations Act* as a result of submissions of the Family Law Subsection of the Canadian Bar Association. Section 54 was included to protect relatives of spouses who settled property on one or both spouses. In these circumstances, the relative could apply under section 54 to vary the terms of the settlement.

Earlier forms of section 54 were designed solely to apply in these circumstances. Such arrangements, however, are rare, and it would not appear that section 54 has ever been used for this purpose. It is our conclusion that there is no need for section 54 in order to vary agreements entered into by the spouses. There is, moreover, no demonstrated need for a mechanism to permit relatives of the spouses to seek variation of a settlement. If a person wishes to settle property on spouses only for the currency of the marriage, the settlement can provide for revocation or variation in the event of marriage dissolution.

A number of correspondents voiced concerns relating to the special nature of spousal agreements. The views expressed reflected the central issue concerning whether spouses can adequately safeguard their interests. On this issue there was no concensus. The following views were expressed:

i. an agreement made before or on marriage should be binding because the spouses should be able to decide for themselves upon the regime of matrimonial property to govern their property rights;

ii. an agreement made before or on marriage should not be binding because spouses cannot anticipate the circumstances that will exist on marriage breakdown;

iii. an agreement made on marriage breakdown should not be binding because one or both spouses, due to stress and emotional confusion, will be unable to safeguard their interests;

iv. an agreement made on marriage breakdown should be binding because spouses are best served if their arrangements can be relied upon as final. Moreover, litigation to resolve these issues is often ruinously expensive and an inappropriate mechanism for settling or safeguarding spousal rights and interests.

These issues were considered by the Commission when the Working Paper was prepared, and have been reconsidered in preparing this Report. Our conclusion remains that the courts must be able to determine whether an agreement was fairly *obtained*. If an agreement was fairly obtained, little is gained by permitting the parties to depart from their bargain because they did not vigilantly protect their interests.

G. Maintenance

The court has jurisdiction to make an order for maintenance notwithstanding a spousal agreement. The reasons for enforcing agreements without

variation discussed in the last section apply equally here. A competing issue of policy, however, is the view that dependent former spouses should not be left destitute. Consequently, courts sometimes vary maintenance obligations defined by agreement when circumstances change, even if the agreement was fair when it was made.

Several features of the law governing variation of maintenance obligations are worth noting. First, the introduction of the current *Family Relations Act* has altered the courts' perspective on maintenance. Frequently, a court will award a dependent spouse a generous share of property and make no order for maintenance. Second, courts generally are reluctant to vary maintenance obligations defined by contract. Third, there is an emerging view that spouses are best served on marital breakdown if all ties between them are severed as promptly as possible. These factors suggest that the policy in favour of protecting a dependent spouse through a continuing jurisdiction to review maintenance obligations has diminished in importance.

It is our view that it is undesirable for courts to be able to ignore the maintenance provisions of agreements freely entered into. Spouses should be able to rely on their agreements without the risk that, perhaps years later, their obligations to a former spouse will be altered.

From time to time the courts will be faced with hard cases, and there will be circumstances where jurisdiction to vary maintenance obligations defined by contract will appear to be desirable. Such a jurisdiction, however, may operate unfairly between spouses who intended their agreement to be binding. For example, spouses may agree on nominal maintenance in consideration of the division of property arrived at. Jurisdiction to vary contractual maintenance obligations will operate unfairly where the courts cannot vary the division of property. Earlier, we concluded that an unfettered jurisdiction to vary the division of property agreed to by spouses was undesirable. Maintenance obligations and rights to property are linked in many respects, and differing jurisdictions to review and vary aspects of contractual arrangements will undoubtedly lead to injustice.

It should be observed that the spouses need not enter into a binding agreement. They can provide, if they desire, for future court review, arbitration or mediation on aspects of their agreement. If the agreement is unfair, a spouse need not sign it. If a spouse is coerced into signing an unfair agreement, the agreement would be unenforceable and the courts would be free to determine adequate maintenance.

This line of reasoning led to the tentative conclusion that courts should not be able to make a maintenance order inconsistent with the provisions of a spousal agreement. It was proposed that:[14]

> A spousal agreement on maintenance obligations to each other be binding unless the agreement
>
> (i) is unenforceable under a statute or a rule of law; or
>
> (ii) was substantially unfair at the time it was entered into and was obtained by one spouse having taken unfair advantage of the ignorance, need or distress of the other spouse.

It was observed in the Working Paper that legislation implementing this proposal would only affect the court's jurisdiction under provincial legislation. The courts would continue to have jurisdiction under federal divorce

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[14] *Working Paper on Spousal Agreements* (No. 51, 1985) at 47.

legislation to vary maintenance obligations after divorce. Such a result would be unfortunate, but mitigated by several factors:[15]

> In fact, however, this divergence in jurisdiction should not lead to many problems. As we noted earlier, the courts are reluctant to vary support obligations agreed to by the spouses. Moreover, where a dependent spouse receives a generous share of property, maintenance is infrequently ordered, or is ordered for only a limited period. Lastly, the courts would still have jurisdiction under provincial legislation to vary maintenance obligations when the agreement was unenforceable at common law, or unconscionable. As a result, it may be expected that few applications after divorce to vary maintenance obligations voluntarily agreed to by the spouses will be successful and seldom will there be any practical difference between the court's jurisdiction under the *Divorce Act* and under provincial legislation.

This proposal proved to be controversial. A number of correspondents supported it, but an equal number expressed reservations. The following extract from one submission summarizes those points of most concern to our correspondents:

> We presume that the proposal that spousal maintenance provided for by agreement ought not to be varied proceeds upon the premise that such an agreement will have been carefully and deliberately constructed, usually with legal advice, and that the parties intend that it settle once and for all the dispute between them.
>
> In fact, such agreements are sometimes entered into quite casually, without proper legal advice, or by people whose income, expenses and prospects fluctuate, and who assume that the agreement may be varied to meet changes in their circumstances.
>
> Another practical problem is that an agreement as to spousal maintenance is not necessarily the last word on that subject, no matter how formal an agreement has been constructed. Spousal and child maintenance are connected, and often pooled. Freezing of spousal maintenance encourages attempts to enlarge the pool by applying for variation of child maintenance.

A further concern was that restricting jurisdiction under provincial legislation to vary maintenance obligations might have little impact on the number of such applications. The result might only be to force applicants to apply under federal legislation in the superior courts, increasing legal costs and the case load of those courts. The points raised by our correspondents are not all of equal force. They indicate clearly, however, a wide spread view that maintenance agreements should be subject to some limited review by the courts.

We are concerned that spouses be allowed to regulate their rights and obligations by agreement. They are better served if their disputes can be

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[15] *Ibid.* at 48. *See, e.g., Pelech* v. *Pelech*, (1985) 61 B.C.L.R. 217, 45 R.F.L. (2d) 1 (C.A.). *Pelech* is currently before the Supreme Court of Canada. *See also, Tomlinson* v. *Tomlinson*, (1985) 49 R.F.L. (2d) 289 (Ont. S.C.); *Babbits* v. *Babbits*, (1986) 50 R.F.L. (2d) 383 (B.C.C.A.); *Seaton* v. *Seaton*, (The Times, Feb. 24, 1986) (Eng. C.A.). The provisions of the federal *Divorce Act, 1985* S.C. 1986, c. 4 direct the courts to consider the impact of provincial legislation on spousal needs for maintenance. Sections 15(5) and (7) provide as follows:

> (5) In making an order under this section, the court shall take into consideration the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, including
> (a) the length of time the spouses cohabited;
> (b) the functions performed by the spouse during cohabitation; and
> (c) any order, agreement or arrangement relating to support of the spouse or child.
> (7) An order made under this section that provides for the support of a spouse should
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8);
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

These provisions would further reduce the divergence between the courts' jurisdiction over maintenance under provincial and federal legislation. Section 15(7)(d) is of particular significance. Where practicable, maintenance obligations should not last indefinitely.

resolved by agreement rather than litigation. The arguments mentioned above, however, suggest a need for a residual jurisdiction to review maintenance obligations defined by agreement.

Sections 57 and 61 of the *Family Relations Act* direct the courts to consider a number of factors when determining support obligations between spouses. For example:

(a) the effect on the earning capacity of each spouse arising from responsibilities assumed by each spouse during cohabitation;
(b) any other source of support and maintenance for the applicant spouse or children;
(c) the desirability of the applicant spouse or child having special assistance to achieve financial independence from the spouse or parent against whom the application is made;
(d) the obligation of the spouse or parent against whom application is made to support another person; and
(e) the capacity and reasonable prospects of a spouse or child obtaining an education or training.

Surprisingly, the court is not directed to consider either the provisions of an agreement made by the spouses or the significance of a division of property between them. In fact, the court's jurisdiction in this regard is entirely separate from any contractual arrangements the spouses may have made. The court does not vary a maintenance agreement. It may make an order respecting maintenance that, presumably, takes the place of an agreement on maintenance.

It is our conclusion that a court should make a maintenance award in favour of a spouse under section 61, or vary a maintenance order under section 62, in terms inconsistent with a spousal agreement only in exceptional or extraordinary circumstances. Moreover, whenever an application for spousal maintenance is made, the court should have regard to the provisions of a spousal agreement as well as any division of property between them. The *Family Relations Act* should be revised to incorporate these principles.

The Commission recommends that:

3. (1) Part 4 of the Family Relations Act *be revised by adding a new section that provides that a court, when considering an application for a maintenance order or for variation of a maintenance order in favour of a spouse that is inconsistent with the provisions of a spousal agreement, shall not depart from the provisions of the spousal agreement unless*

(a) there are extraordinary circumstances justifying such an order or variation;
(b) the agreement is unenforceable under a statute or rule of law; or
(c) the agreement was substantially unfair at the time it was entered into and was obtained by one spouse having taken improper advantage of the ignorance, need or distress of the other spouse.

(2) Section 61 of the Family Relations Act *be revised to direct the courts to consider the provisions of a spousal agreement, and any distribution of property between the spouses.*

(3) Sections 57, 61 and 62 of the Family Relations Act *be revised to provide that they are subject to the new section recommended in 3(1).*

H. Contracting Out of Other Rights

Frequently, spouses intend their agreement to represent a final settlement of all disputes between them. A common provision in a separation agreement is that each spouse waives any and all rights in the property of the other spouse. Even apart from the courts' ability to vary spousal agreements under the *Family Relations Act*, provisions of this nature often have little utility.

In some cases spouses, when making a separation agreement, overlook prior arrangements they have made benefitting each other. For example, often one or both spouses will have life insurance, under which the surviving spouse is the beneficiary. The spouses may also have made wills leaving their estates to each other.

The law governing succession provides spouses with a number of rights. Under the *Estate Administration Act*, for example, the surviving spouse is entitled to share in the deceased's estate if he died without leaving a valid will. Under the *Wills Variation Act*, the surviving spouse is entitled to apply to the court for a share of the deceased's estate, if the deceased spouse's will did not make adequate provision for the surviving spouse.

Rights of succession under the *Estate Administration Act* may be waived by contract or otherwise. *Inter vivos* agreements concerning succession contained in marriage settlements[16] and in separation agreements[17] have been held to be effective waivers of rights to succeed on intestacy.

A person entitled to apply for relief under the *Wills Variation Act* may not contract out of the benefit of the Act. The Act was passed not only in the interests of the potential applicant, but also in the interests of third parties, including the Crown, who might become responsible for their maintenance.[18] The court retains jurisdiction to make an award notwithstanding that the agreement was executed prior to marriage,[19] upon separation,[20] or after the testator's death.[21] Nor is it significant that the applicant has received valuable consideration for the waiver. The consideration received by the applicant under a contract waiving rights pursuant to the *Wills Variation Act* will be taken into account in determining what would be adequate provision for the applicant.[22] In *Re Lewis*[23] property was settled on the applicant wife, which she agreed to regard as sufficient maintenance after the testator's death. In *Re Close*[24] the wife, in exchange for cash, agreed that the testator's will should remain in full force and effect. In neither case were the agreements sufficient to oust the court's jurisdiction to determine whether adequate provision had been made for the wife.

New Brunswick legislation contains a section that recognizes contracts to leave by will. In *Re Marquis' Estate*[25] the testator and the applicant widow

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[16] *Re Jutras Estate*, [1932] 2 W.W.R. 533 (Sask. C.A.).

[17] *Re Jones Estate*, [1950] 2 W.W.R. 313 (B.C.S.C.); *Re Dalton* [1934] O.W.N. 691 (Ont. H.C.); *Re Rist Estate*, [1939] 1 W.W.R. 518, [1939] 2 D.L.R. 644 (Alta C.A.); *cf. Jones v. Kline and Hoe*, [1938] 3 W.W.R. 65, [1938] 4 D.L.R. 391 (Alta S.C.).

[18] *Cooperman v. Cooperman*, [1978] 5 W.W.R. 518, (1978) 3 E.T.R. 39 (B.C.S.C.); *Re Lewis Estate*, (1935) 49 B.C.R. 386, [1935] 2 D.L.R. 45, [1935] 1 W.W.R. 747 (B.C.C.A.); *Jones*, *supra*, n. 17.

[19] *Re Berube*, [1973] 3 W.W.R. 180, (1973) 12 R.F.L. 97, 34 D.L.R. (3d) 445 (Alta. C.A.); *Collard v. Collard*, (1976) 28 R.F.L. 252 (Sask. Surr. Ct.); *Re Duranceau*, [1952] O.R. 584, [1952] 3 D.L.R. 714 (C.A.).

[20] *Cooperman*, *supra*, n. 18; *Jones*, *supra*, n. 17; *Re Edwards Estate*, (1961) 36 W.W.R. 605, 31 D.L.R. (2d) 308 (Alta. C.A.); *Re McNamara Estate*, (1943) 59 B.C.R. 70, [1943] 3 D.L.R. 396, [1943] 2 W.W.R. 344 (C.A.); *Re Foxe Estate*, (1944) 60 B.C.R. 77, [1944] 2 D.L.R. 392 (S.C.).

[21] *Re Stannard Estate*, (1960) 32 W.W.R. 432 (B.C.S.C.).

[22] *Re Lewis Estate*, *supra*, n. 18, *Re Hawley Estate*, (1962) 38 W.W.R. 354 (Sask. Q.B.); *Re McNamara Estate*, *supra*, n. 20; *Re Casselman*, (1974) 4 O.R. (2d) 166, 47 D.L.R. (3d) 354 (H.C.); *Menrad v. Blowers*, (1982) 28 R.F.L. (2d) 289 (Man. Q.B.).

[23] *Supra*, n. 18.

[24] [1952] O.W.N. 660, [1952] 3 D.L.R. 814 (C.A.).

[25] (1980) 30 N.B.R. (2d) 93, 70 A.P.R. 93 (Q.B.).

each agreed not to make any claims on the other's estate in order that their respective estates might go to the children of former marriages. The court examined the provisions of the will executed by the testator, and felt that he had provided adequately for his wife. It is implicit in this decision that the deceased's agreement with his wife to leave his estate to his children fell within that section of New Brunswick legislation that recognizes contracts to leave by will.

In other jurisdictions applicants are expressly permitted to waive rights under the Act. In England an agreement to waive rights under the Act must be approved by the court to be effective. Professor Martyn, commenting on section 15 of the English *Inheritance (Provision for Family and Dependents) Act 1975*, makes the following observations:[26]

> This provides a means whereby property arrangements on the break up of a marriage can be given the advantage of finality. Secondly, on an application under the Act by a person entitled to payments from the deceased under a secured periodic payments order made under the *Matrimonial Causes Act 1973*, the court is given power to vary or discharge that order. Thirdly, the court has a similar power to vary or revoke a maintenance agreement, on an application under the Act by a person entitled to payments under such an agreement. Fourthly, the reverse applies:where an application is made. . . for the variation or discharge of a secured periodical payments order after the death of the payer,or. . . for the alteration of a maintenance agreement, the court has power, in effect, to treat the application as an application under the Act and exercise its powers thereunder. This does not apply, however, if future applications under the Act have been barred by an order under section 15 of the Act. . .

The *Family Relations Act* provisions regarding entitlement to family property have altered the importance of continuing maintenance, and also required amendments to other aspects of the law. For example, the *Wills Act* now provides that a surviving spouse whose marriage to a testator has been subject to an order of judicial separation, divorce or nullity, unless there is a contrary intention, is not entitled to take under the testator's will.[27] The deceased's former spouse has already received a fair share of family assets. Entitlement to a further share because the deceased forgot to alter his or her will would be, in most cases, inappropriate.

In our Report on *Statutory Succession Rights*,[28] we recommended amendments to section 16 of the *Wills Act* to ensure that it operated only when the surviving spouse had become entitled to an interest in family property.[29] We also recommended that a surviving spouse who had become entitled to a share in family property not be entitled to share if the deceased spouse died intestate.[30] A former spouse, however, would be entitled to apply for a share in the deceased's estate, notwithstanding these two recommendations, if he or she were entitled to maintenance at the time of the deceased's death.[31]

Where the spouses have turned their minds to separating their estates and defining the limits of their obligations to each other, an agreement recording their decisions should be binding. Similarly, where the spouses have agreed not to claim against each other's estates, that too should be binding on them.

The Commission recommends that:

4. Spouses be able to waive rights under the Estate Administration Act *and under the* Wills Variation Act.

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[26] J.G. Ross Martyn, *The Modern Law of Family Provision*, (1978), at 11-12.
[27] R.S.B.C. 1979, c. 434, s. 16; proclaimed in force Aug. 1, 1981.
[28] L.R.C. 70, 1983.
[29] *Ibid.*, recommendation 19, at 148.
[30] *Ibid.*, recommendation 20, at 149.
[31] *Ibid.*, recommendation 10, at 147.

I. Form of a Spousal Agreement

A common misconception is that an agreement must be in writing before it is valid. In fact, in many cases an oral agreement is binding, provided its terms can be established to the satisfaction of a court. That is often difficult to do. In 1677, English legislation was passed to require certain transactions be in writing to be enforceable.[32] The British Columbia *Statute of Frauds*[33] was based on that legislation. Requiring certain transactions, such as those relating to land, to be in writing was beneficial in several respects. The written agreement provided clear evidence of the terms of the agreement. Parties were also made aware of the significance of the transaction and were less likely to take unconsidered actions.

The *Statute of Frauds* also caused problems. In some cases, for example, the parties would rely on an unenforceable oral agreement, perhaps for years. In the event of a breach of the agreement the innocent party was not entitled to a remedy. Another problem that arose frequently was that only part of the agreement was in writing, and the courts had to consider whether it satisfied the requirements of the *Statute of Frauds*.

The courts developed a number of rules and techniques to deal with these problems, to prevent the *Statute of Frauds* from itself being used as an instrument of fraud.

In 1985, the British Columbia *Statute of Frauds* was repealed, and new legislation was implemented.[34] Under that legislation, writing is still required for certain kinds of contracts, but oral agreements may also be enforceable in particular circumstances. For example, an oral agreement may be enforceable if there has been part performance of it.[35] The new legislation also empowers the courts to provide a remedy where the agreement is unenforceable. For example, the court may order compensation for money spent in reliance on the agreement.[36]

Insofar as an agreement made between spouses concerns interests in land, it must satisfy the statutory requirements before it is enforceable. Satisfying these requirements, however, is only the first step.

The provisions of the *Family Relations Act* are concerned with a different issue than the enforceability of agreements. Even if the contract is enforceable, the courts have jurisdiction to determine whether its provisions are fair. We have made recommendations to limit the circumstances in which the courts should intervene when the spouses have resolved their disputes by agreement.

Our concern is whether these recommendations should apply to any enforceable agreement, or whether legislation should require certain formalities be observed before the agreement is immune from review of the fairness of its terms alone. Formalities of execution might include requirements for writing, the parties' signatures, witnesses and proof of independent legal advice.

Execution formalities serve a number of functions. These functions may be described as fulfilling "evidentiary," "cautionary," "channelling" and "protective" purposes.

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[32] *Statute of Frauds, 1677*, 29 Car. 2, c. 3.

[33] R.S.B.C. 1979, c. 393, as rep. *Law Reform Amendment Act, 1985* S.B.C. 1985, c. 10, s. 8.

[34] *Law Reform Amendment Act, 1985*, *supra*, n. 33, s. 7.

[35] *Ibid.*, s. 7(3)(c).

[36] *Ibid.*, s. 7 (5) (b).

The evidentiary function is served by the requirement that agreements be in writing. The degree to which such evidence can be trusted will depend on the circumstances in which the agreement is executed.

The procedure surrounding the formal execution of an agreement is ceremonial and ritual, and therefore serves a cautionary function. Persons signing an agreement probably associate performing ceremonial tasks with the act of making a final agreement and not merely a preliminary draft. Accordingly, they are put on notice that the contents of the document being executed are of importance. People are likely to take more care to understand their agreements.

A requirement for independent witnesses can be seen as serving protective functions. It is an attempt to ensure that unbiased evidence of the events surrounding the execution of the agreement can be adduced.

The channelling function can best be described as the effect of the other three functions. The formal document created by these prerequisites for valid execution can be taken on its face by all parties to be valid. Parties to the agreement can rely on it, litigation and expense is avoided, and advice made more certain. The document can move through the judicial system with a minimum of friction.

While formalities of execution present these advantages, there is the counterbalancing risk that agreements, otherwise unobjectionable, are upset because of defects in their execution.

In other jurisdictions that have considered this question it has been concluded that spouses must observe certain formalities when making their agreements. These formalities require the spouses to consider the importance of the agreement they are making, and ensure that they carefully consider their position under the agreement.

Some jurisdictions, for example, require spousal agreements to be in writing, signed by the spouses and witnessed. Some jurisdictions require the spouses to acknowledge before different lawyers that they are aware of, and voluntarily waive their rights under, family property legislation.

It is our view that legislation should define minimum standards which must be observed before the court's jurisdiction to determine the appropriateness of the agreement is removed. Legislation should require that a spousal agreement be in writing and signed by the parties to it. If these formalities are observed, the courts should have no jurisdiction to determine an appropriate division of family property unless the agreement is unenforceable or unfairly obtained. If the agreement was made without observing these formalities, the court should retain jurisdiction to review the fairness of the agreement's terms. The courts should be reluctant, however, to depart from the terms of an agreement that is objectionable only because it is not in writing or not signed by the spouses.[37]

The Commission recommends that:

5. (1) The Family Relations Act *be revised by deleting references to marriage agreements, separation agreements and ante and post nuptial settlements. The term "spousal agreement" should be used instead.*

(2) Legislation provide a definition of "spousal agreement" similar to the following:

A spousal agreement is a written agreement between two persons, signed by those persons, made before, during or after their marriage, in which they

[37] *See, e.g., Re Gossman and Gossman*, (1985) 34 A.C.W.S. (2d) 455 (B.C.S.C.); *Campbell* v. *Campbell*, (1985) 47 R.F.L. (2d) 392 (Ont. H.C.).

agree on their respective rights and obligations under the marriage, upon marriage breakdown or upon death, including

(a) ownership in or division of property;

(b) support obligations; or

(c) any other matter in the settlement of their affairs.

One comment received on the Working Paper questioned how the recommended definition of "spousal agreement" fits into the current scheme of the *Family Relations Act*. Part III of the *Family Relations Act* deals with property rights, and provides a definition of "marriage agreement" in section 48. A marriage agreement must be made observing certain formalities and relates to the ownership or management of assets.

The proposal in the Working Paper contemplated that the *Family Relations Act* be revised by deleting references to marriage agreements, separation agreements and ante and post nuptial settlements. Recommendation 5 has been revised to clarify that issue. The term "spousal agreement" should be used in place of these other terms.[38] Recommendation 5, consequently, contemplates a number of drafting changes to the *Family Relations Act*.

J. Where an Agreement Does Not Refer to All Assets

It was mentioned in the last chapter that in some cases courts have reapportioned entitlement to specific property because it was not referred to in the spousal agreement. This approach rests on a conclusion that where a spousal agreement omits reference to particular property the spouses have not resolved by agreement entitlement to it. This conclusion is surprising, and not altogether appropriate, where the spouses intended their agreement to settle finally all of their disputes. Frequently, for example, spousal agreements provide that assets not mentioned in the agreement are to be retained by the party who has possession of them. Provisions of this nature, however, have not prevented courts from reapportioning entitlement to assets not specifically referred to in the agreement.

Where one spouse conceals assets from the other, the jurisdiction to determine entitlement to them is probably appropriate, whatever the terms of the spousal agreement. Similarly, where a spousal agreement is not intended to settle all matters in dispute, courts should have jurisdiction to divide property where the spouses cannot reach agreement. Of questionable desirability, however, is court intervention when spouses have entered into an agreement intending it to be a complete settlement of their disputes.

In some cases, spouses may negotiate fully aware of the extent of each other's assets, execute an agreement defining their respective interests in property, and only later discover they might have been entitled to more. Under the law governing contracts generally, that would probably not be sufficient reason for courts to vary the terms of an agreement. Under the *Family Relations Act*, courts have departed from the usual rule in contract. There are several reasons for that departure.

First, the courts have been faced with several hard cases. Typically, in these cases, spouses have entered into an agreement before the enactment of

[38] Revising the *Family Relations Act* to refer to spousal agreements instead of a variety of agreements will require some careful drafting. For example, under the *Family Relations Act* the making of a separation agreement is one of several events that triggers entitlement to family property. Clearly, some kinds of spousal agreements, such as an agreement made before marriage, should not be a triggering event. Triggering events listed in s. 43 relate to circumstances of marriage breakdown. The reference to separation agreements, therefore, might be revised to provide that the making of a spousal agreement which recognizes the fact of separation is a triggering event.

the current *Family Relations Act*. That Act radically altered spousal rights so that agreements reasonable under the former law now appeared to be unfair. Spouses did not address the issue of entitlement to interests in pensions or professional practices, for example, simply because at the time their agreement was made these were not considered items of family property. Whether courts were correct to intervene in these cases is open to question. These are issues, however, that may be characterized as problems of transition that arise, if at all, in diminishing numbers.

Second, failure to address entitlement to an asset of significant value suggested that one spouse was unaware of the possibility of claiming an interest in it. In these circumstances the agreement is arguably unfair, and would call for intervention under sections 51 or 54 of the *Family Relations Act*.

Not all courts have been willing to intervene to vary entitlement to assets not specifically referred to in spousal agreements. Typically, courts which decline to do so observe the policy against interfering with settled affairs.

Although the approach adopted by courts which are prepared to determine entitlement to assets in these circumstances is explicable, it will lead to anomalous results upon the implementation of our recommendations in legislation. For example, if the spouses record in their agreement that one spouse will retain his pension benefits, the agreement will be immune from attack. If, however, the spouses agree instead that all property not mentioned in the agreement is to remain the separate property of its owner, then some courts might still be prepared to intervene.

For this reason, in the Working Paper it was proposed that property not mentioned in a spousal agreement that was intended to resolve all matters between the spouses should remain the property of its owner.

Most of our correspondents agreed with this approach. There was, however, some support for letting the usual rules governing the interpretation of contracts resolve disputes of this nature. It was suggested that the rule of construction endorsed by the Commission might prevent the courts from determining entitlement to property which was not the subject of agreement by the spouses. Moreover, the rule of construction appeared to be inconsistent with the provisions of the *Family Relations Act*, which provide that entitlement to property is *prima facie* equal unless the spouses otherwise agree. If the spouses have agreed to a different division of property, it will emerge from the terms of their agreement, properly interpreted, and no new rule of construction is called for. Lastly, it was suggested, a provision that property not dealt with in a spousal agreement remained separate property might lead to claims for professional negligence.

The effect of our previous recommendations should be to emphasize the importance of contractual arrangements between the spouses, and induce the courts to exercise restraint when asked to vary entitlement to property merely because it is not specifically referred to in a spousal agreement. They do not, however, compel restraint and there is a concern that the courts would remain free, and might continue, to treat such property as subject to distribution under the Act. For that reason, there is a need for a rule of construction that would remove all doubt concerning the distribution of such property.

The concerns voiced by some of our correspondents overlook the significance of an agreement designed to finally resolve all matters in dispute between the spouses. The spouses are concerned to locate, and negotiate all claims respecting, their assets. It was not contemplated that the proposed rule of construction apply to determine entitlement to assets one spouse conceals

from the other, nor to alter a specific agreement concerning such entitlement. The concern, really, relates to one spouse wishing to reopen negotiations generally. The finality of agreements is jeopardized unduly if they can be reopened merely because entitlement to particular property was not mentioned in the agreement. A rule of construction to enhance the importance of spousal agreements, consequently, is necessarily inconsistent with the philosophy of the *Family Relations Act* provisions that address entitlement to property in the absence of agreement.

We are troubled by the possibility that the rule of construction may lead to claims for professional negligence. It seems incorrect, however, to adopt the view that agreements should not be binding so that lawyers are protected from a claim for negligence. The rule of construction, as mentioned earlier, has significance only when a spousal agreement neglects to address entitlement to assets the existence of which is known to both spouses. Where the existence of property is known to the spouses at the time their agreement is made, it is difficult to justify a rule of construction which would permit reopening the issue of entitlement to property.

The Commission recommends that:

6. Subject to a contrary intention, property the existence of which is known to both spouses but which is not specifically referred to in a spousal agreement intended by the spouses, or which appears to have been intended by them, to separate and finalize their interests in property shall be deemed to remain the property of its owner.

The reference to "property the existence of which is known to both spouses" confines the operation of this recommendation. This recommendation would not apply, for example, where one spouse conceals property from the other.

K. Application

Legislation altering the former law often raises issues of transition. Should legislation implementing the Commission's recommendations have retrospective effect, or only apply prospectively?

In our view, the amendments recommended should apply retrospectively. They are necessary to confirm the nature and extent of the court's jurisdiction under the *Family Relations Act* to review agreements made between spouses. The usual problems of transition do not arise, since the Commission's recommendations, in general, endorse an approach many courts currently adopt in the application of this jurisdiction. It is difficult to see what benefit would result from providing that agreements made by spouses before these amendments are implemented continue to be subject to the former law.[39]

The Commission recommends that:

7. Legislation implementing these recommendations should apply to agreements between spouses whenever they were entered into.

[39] The introduction of the current *Family Relations Act* raised a similar issue of transition. It was resolved that agreements made before the introduction of the Act were reviewable under it.

A. Summary

Case authority on the court's jurisdiction under the *Family Relations Act* to vary spousal agreements is inconsistent. It is desirable to clarify the ambit of this jurisdiction.

The choice is between an unfettered discretion to vary agreements which are unfair in the sense that they are improvident, or a more limited jurisdiction to vary the provisions of an agreement only it it was not freely entered into. The importance of permitting parties to settle their differences by agreement suggests that the latter course should be adopted.

Under the *Family Relations Act* the court has separate jurisdictions to review maintenance obligations and entitlement to property. Maintenance and property rights are linked, however, so that the separation between these jurisdictions has blurred. It is our view that courts should not vary a division of property agreed to by spouses unless the agreement itself was not freely entered into. Slightly more flexibility is called for when considering maintenance obligations, but a court order that is inconsistent with an agreement on maintenance for a spouse should be made only in extraordinary circumstances.

B. List of Recommendations

The following is a list of recommendations made in this Report.

1. Section 54 of the Family Relations Act *be repealed. (Page 25)*

2. A spousal agreement relating to entitlement to property may not be varied pursuant to section 51 of the Family Relations Act *unless the agreement*

(a) is unenforceable under a statute or a rule of law; or

(b) was substantially unfair at the time it was entered into and was obtained by one spouse having taken improper advantage of the ignorance, need or distress of the other spouse. (Page 25)

3. (1) Part 4 of the Family Relations Act *be revised by adding a new section that provides that a court, when considering an application for a maintenance order or for variation of a maintenance order in favour of a spouse that is inconsistent with the provisions of a spousal agreement, shall not depart from the provisions of the spousal agreement unless*

(a) there are extraordinary circumstances justifying such an order or variation;

(b) the agreement is unenforceable under a statute or rule of law; or

(c) the agreement was substantially unfair at the time it was entered into and was obtained by one spouse having taken improper advantage of the ignorance, need or distress of the other spouse.

(2) Section 61 of the Family Relations Act *be revised to direct the courts to consider the provisions of a spousal agreement, and any distribution of property between the spouses.*

(3) Sections 57, 61 and 62 of the Family Relations Act *be revised to provide that they are subject to the new section recommended in 3(1). (Page 28)*

4. Spouses be able to waive rights under the Estate Administration Act *and under the* Wills Variation Act. *(Page 30)*

5. (1) The Family Relations Act *be revised by deleting references to marriage agreements, separation agreements and ante and post nuptial settlements. The term "spousal agreement" should be used instead.*

(2) Legislation provide a definition of "spousal agreement" similar to the following:

A spousal agreement is a written agreement between two persons, signed by those persons, made before, during or after their marriage, in which they agree on their respective rights and obligations under the marriage, upon marriage breakdown or upon death, including

(a) ownership in or division of property;

(b) support obligations; or

(c) any other matter in the settlement of their affairs. (Pages 32-33)

6. Subject to a contrary intention, property the existence of which is known to both spouses but which is not specifically referred to in a spousal agreement intended by the spouses, or which appears to have been intended by them, to separate and finalize their interests in property shall be deemed to remain the property of its owner. (Page 35)

7. Legislation implementing these recommendations should apply to agreements between spouses whenever they were entered into. (Page 35)

C. Acknowledgments

We wish to express our appreciation to all those who responded to the Working Paper which preceded this Report. The responses were numerous and provided valuable assistance in the preparation of this Report.

We also wish to thank Thomas G. Anderson, Counsel to the Commission, who, subject to the Commission's direction, prepared the Working Paper and this Report.

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